[redacted]

[redacted] 1925

[redacted] 328

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY, APPELLANT,

vs.

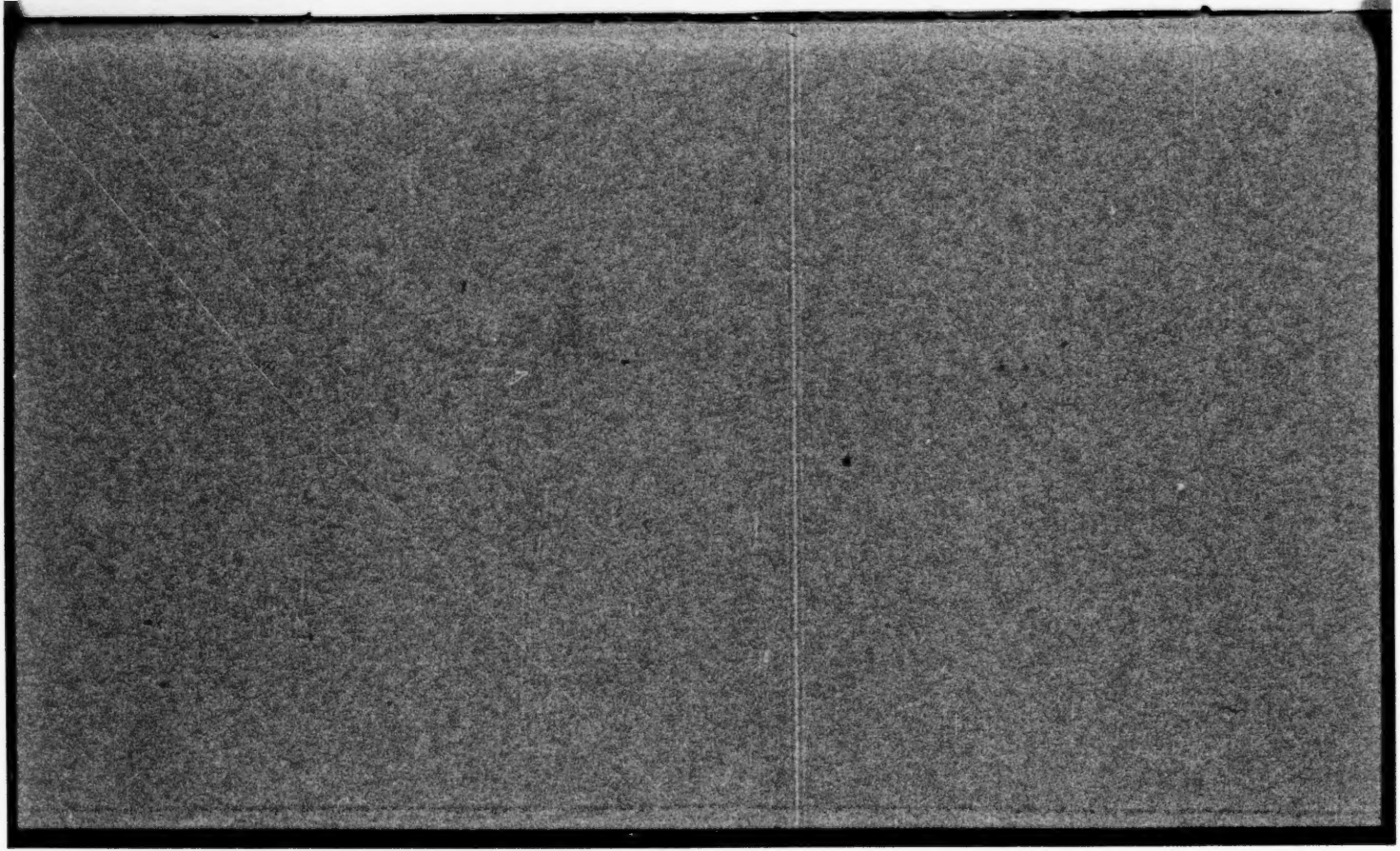
INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, AND THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

203/107

FILED MARCH 16, 1925.

(30,974)



(30,974)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 1009

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY, APPELLANT,

vs.

INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,. AND THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 2, 1925

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[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION**

In Equity No. 50

THE EQUITABLE TRUST COMPANY OF NEW YORK and ELIAS J. JACOBY, as Trustees, Complainants,

vs.

CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY, THE Cincinnati, Hamilton & Dayton Railway Company, and Judson Harmon and Rufus B. Smith, as Receivers of The Cincinnati, Hamilton & Dayton Railway Company, Defendants

MOTION BY THE CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY FOR LEAVE TO FILE PETITION AND SERVE NOTICE THEREOF—Filed July 2, 1924

The Cincinnati, Indianapolis & Western Railroad Company respectfully represents to the court that it is a party to the above entitled cause, and that The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company are likewise parties to said cause. Movant moves the court for leave to file the petition submitted herewith and that notice thereof with a copy of said petition may be served on said other parties above named.

F. J. Goebel, Murray Seasongood, Solicitors for Movant.
Cadwalader, Wickersham & Taft, of Counsel.

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING PETITION OF THE CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY TO BE FILED AND SERVED—Filed July 2, 1924.

The Cincinnati, Indianapolis & Western Railroad Company having filed its motion for leave to file a petition submitted with said motion,—

Ordered, said petition may be, and it is filed;

Ordered, further, that the marshal of this District serve a copy of said petition upon The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and also upon The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, together with a copy of this order, and that each of said companies, within twenty days

after said service, answer said petition or show cause otherwise why the prayer thereof should not be granted.

Ordered, further, that whereas The Indianapolis Union Railway Company is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in the city of Indianapolis, in said state, and cannot be served within this jurisdiction, that the marshal for the District of Indiana serve a copy of said petition upon said The Indianapolis Union Railway Company, together with a copy of this order, and that said Company, within twenty days after said service, answer said petition or show cause otherwise why the prayer thereof should not be granted.

Enter.

(Signed) Hickenlooper, J.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETTION OF THE CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY—Filed July 2, 1924

To the Honorable the Judges of said District Court for the Southern District of Ohio, Western Division:

Comes now The Cincinnati, Indianapolis & Western Railroad Company, one of the parties to the above entitled cause, and respectfully shows:

That it is a corporation incorporated under the laws of the State of Indiana, operating a line of railroad extending from the city of Hamilton, Ohio, westerly through the state of Indiana and to the city of Springfield in the state of Illinois; that it is the assignee of the purchaser of the railroad property sold under foreclosure in this cause; said purchaser having acquired title thereto by virtue of the foreclosure sale heretofore had in the proceedings in this cause; that it received deed as the assignee of said purchaser to said property from Noble C. Butler, Special Master, and others, covering said property, dated November 30th, 1915; and that it became a party to this cause as such assignee of said purchaser as provided in the decree of foreclosure, and as shown by the order of the Court [fol. 4] entered herein on the 29th day of November, 1915.

That said decree of foreclosure entered on the 29th day of June, 1915, in this cause, contained among other things the following provisions:

"All questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this court for further relief at the foot of this decree."

That The Indianapolis Union Railway Company is and has been for many years past a railway corporation organized and existing under the laws of the State of Indiana, and operates a certain union

station and terminal facilities in the City of Indianapolis, Indiana; that on the 10th day of December, 1915, the said The Indianapolis Union Railway Company filed its intervening petition in this cause, asking that it be adjudged to have a lien for a certain sum of money against the property of the Cincinnati, Indianapolis & Western Railway Company, and thereby became a party to this cause.

That among other things said decree of foreclosure provided as follows:

"The purchaser and his successors or assigns shall have the right, for the period of thirty days after the delivery of the deed or instruments of transfer from the Special Master hereinafter provided for, to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall file a written election not to assume or adopt the same with the Clerk of this Court within said period of thirty days."

That pursuant thereto this petitioner filed on the 24th day of December, 1915, with the Clerk of this Court, which was within thirty days after the delivery of the deeds from the Special Master, an election not to assume or adopt certain contracts, which said election reads as follows:

"To whom it may concern:

Please take notice that The Cincinnati, Indianapolis and Western Railroad Company is the assignee of all property sold at the foreclosure sale in this cause and is now the owner of said property by virtue of deeds signed by Noble C. Butler, Special Master herein, and Frederick H. Ecker who acted in this matter as a purchasing [fol. 5] committee and others and said The Cincinnati, Indianapolis and Western Railroad Company in exercise of the rights granted to such purchaser and his successors or assigns by the foreclosure decree heretofore entered in this court, does hereby elect not to assume or adopt each of the following contracts:

First. The contract between the Big Four, I. D. & W. and White River Railroad Company, dated March 6th, 1900, providing for operation and maintenance of tracks at Indianapolis, being the contract shown as No. 1 under VII of the foreclosure decree heretofore entered in this case.

Second. Correspondence between C. H. & D and P. C. C. & St. L. Railway Company constituting contract covering maintenance of crossing with Belt Line at Indianapolis, Indiana, correspondence covers period ending July 24th, 1896, being the contract referred to as No. 8 under VII of the foreclosure decree heretofore entered herein.

Third. Contract dated September 20th, 1883, and amendment of August 20th, 1906, under which tracks of the Union Railway Com-

pany are occupied in Indianapolis, in so far as such rights are conferred by the signature of the Indianapolis, Decatur & Springfield Railway Company to said contract. This assignee hereby expressly accepts such contract as made with the Cincinnati, Hamilton & Indianapolis Railroad Company, and desires to accept the benefits of the contract with said Company, and the right to occupy the tracks of the Union Railway Company and the Indianapolis Belt Railway Company therein conferred. The contract referred to at No. 14 of VII of the original foreclosure decree is in fact two contracts, which were each owned by the Cincinnati, Indianpolis & Western Railway Company at the time of this foreclosure decree, by virtue of being a consolidated corporation which had succeeded to and become bound by contracts of both the Indianapolis, Decatur & Springfield Railway Company and also the Cincinnati, Hamilton & Indianapolis Railroad. The Cincinnati, Indianapolis & Western Railroad Company therefore now elects not to assume or adopt by obligations imposed by the contract with the Indianapolis, Decatur & Springfield Railway Company.

Fourth. Contract between I. D. & W. and Springfield Consolidated Railway Company, dated August 30th, 1902, for 11th street crossing at Springfield, Illinois, which is shown as No. 21 under VII of the foreclosure decree entered herein.

Fifth. Contract between C. I. & W. and Springfield Clear Lake & Rochester Interurban Company, dated July 21st, 1906, for crossing east of Springfield, Illinois, and supplement thereto, dated July 20th, 1908, being the contract shown at No. 35 under VII of the foreclosure decree entered herein.

Sixth. Contract of May 11th, 1905, between the C. C. C. & St. L. Ry Co. and C. H. & D. Ry. Co., respecting crossing gates at West Washington and Harding Streets, Indianapolis, being the contract shown at No 51 under VIII of the foreclosure decree heretofore entered herein.

Seventh. Contract of September 7th, 1881 between the C. H. & D. Ry. Company and the Newcastle & Rushville Railroad Company, now L. E. & W., for crossing at Rushville, being the contract shown at No. 56 of VIII of the foreclosure decree heretofore entered herein.

Eighth. Contract of recent date not shown in the foreclosure decree, with the C. C. C. & St. L. Ry. Company with reference to one crossing frog at Moorefield, Indiana, where the C. C. C. & St. L. [fol. 6] "Wye" and the C. I. & W. main track cross at the Belt crossing, which contract provides that said "wye" is to be maintained without expense of the C. C. C. & St. L.

Ninth. Contract now shown in the foreclosure decree with the C. C. C. & St. L. Ry. Company, dated April 10th, 1906, with reference to one crossing frog and interlocking plant at Chrisman, Illinois.

Tenth. Two contracts between the Cincinnati, Indianapolis & Western Railway Company and the Indianapolis & Cincinnati Trac-

tion Company, both dated May 27th, 1904, for crossings at Morgan Street, Rushville, and near Irvington, Indiana.

Eleventh. Contract dated December 30th, 1901, with J. W. Forsinger with reference to watch inspection.

Twelfth. Contract of April 1st, 1907, between the Cincinnati, Hamilton & Dayton Railway Company and the Standard Life & Accident Insurance Company with reference to accident insurance policies.

The above list may be incomplete and the Cincinnati, Indianapolis & Western Railroad Company expressly reserves the right to reject other contracts within the period of thirty (30) days by filing an additional written election.

The Cincinnati, Indianapolis & Western Railroad Company, by B. A. Worthington, President. Paxton, Warrington & Seasongood, Elam, Fesler, Elam & Young, Solicitors.

[fol. 7] That the two contracts, mentioned under section Third of the foregoing election, one of which was adopted and one of which was rejected, were contracts brought about by the execution by the Indianapolis, Decatur & Springfield Railway Company on or about December 14th, 1883, of a certain contract dated September 20th, 1883, between certain proprietary and associate companies covering the use of the terminal facilities in Indianapolis, Indiana, and the execution of said contract of September 20th, 1883 by the Cincinnati, Hamilton & Indianapolis Railroad Company on or about September 15th, 1888, both of said Companies so executing said contract being associated companies.

That at the time of the execution of said agreement by said Companies, respectively, the Indianapolis, Decatur & Springfield Railway Company was a line of railroad extending from Indianapolis, Indiana westward to Decatur, Illinois and other points, and the Cincinnati, Hamilton & Indianapolis Railroad Company was a line of railroad extending from Indianapolis, Indiana eastward to the city of Rushville, Indiana and other cities. Shortly thereafter the Indianapolis, Decatur & Springfield Railway Company was succeeded by the Indiana, Decatur & Western Railroad Company, and the said Indiana, Decatur & Western Railroad succeeded to all the rights and obligations of said Indianapolis, Decatur & Springfield Railway Company by reason of the latter's execution of the aforesaid contract of September 20, 1883.

That in the year 1902 the Cincinnati, Indianapolis & Western Railway Company was formed by the consolidation of the Cincinnati, Hamilton & Indianapolis Railroad Company and the Indiana, Decatur & Western Railroad Company, and that thereafter the Cincinnati, Indianapolis & Western Railway Company, or its agents, continued to carry out each of the aforesaid contracts of the Indianapolis, Decatur & Springfield Railway Company and the Cincinnati, Hamilton & Indianapolis Railroad Company for the use of the facilities of said The Indianapolis Union Railway Company, to

the same extent and in exactly the same manner as said contracts were carried out by its constituent companies as aforesaid.

That said contract of September 20th, 1883, made by and between [fol. 8] the proprietary companies, and later executed by the Indianapolis, Decatur & Springfield Railway Company and the Cincinnati, Hamilton & Indianapolis Railway Company as foresaid, provided for the transfer of certain property by the proprietary companies to the Indianapolis Union Railway Company; the construction of a new union station at Indianapolis, an appraisement of all of said property, including the value of a lease for 999 years made by the Indianapolis Belt Railway Company to the Indianapolis Union Railway Company and also additions and betterments, and all engines, cars and other equipment; that interest at the rate of seven per centum per annum on said value so ascertained should constitute the fixed rental to be paid the Union Railway Company by the several companies making use of the same, said fixed rental to be from time to time divided into as many equal shares as there are railroad companies using said property; that a separate account be kept for the use of the Belt tracks and of the Union Railway tracks, including all expenses growing out of the maintenance, operation, renewal and replacement of the same, including taxes, assessments, insurance, wages and salaries, etc., such expense to be paid by the several companies using each system in proportion to such use, on the basis of wheelage. After provisions covering minor operating conditions and liability for personal injuries, the contract provided for the admission of certain associate companies upon application and signing and sealing of a copy of said agreement, and thereupon such associate companies became perpetually bound thereby and were entitled to the use of the facilities perpetually. The contract also provided for a Board of Managers to be composed of a representative of each of the proprietary and associate companies admitted to the use of the facilities.

That from the year 1902 to the year 1915 the Cincinnati, Indianapolis & Western Railway Company was a single corporation which owned and was obligated to perform and did perform the two contracts of the Indianapolis, Decatur & Springfield Railway Company and the Cincinnati, Hamilton & Indianapolis Railroad Company with the Indianapolis Union Railway Company, by reason of its acquisition of said two contracts of its predecessors as aforesaid. [fol. 9] By virtue of such acquisition of said two contracts and Cincinnati, Indianapolis & Western Railway Company was given two votes on the Board of Managers, was required to and did pay two parts of the fixed rental provided for, was rendered and paid two separate bills for two separate divisions of the operating and other expenses, and its rights and obligations were considered and treated by all parties concerned at all times as rights and obligations arising under two contracts with The Indianapolis Union Railway Company. There was an amendment made in 1906 to said contract of September 20th, 1883, which pertained only to liability for personal injuries, and said amendment was signed by the Cincinnati, In-

dianapolis & Western Railway Company by affixing thereto two separate signatures, one as successor to the Cincinnati, Hamilton & Indianapolis Railroad Company and another as successor to the Indiana, Decatur & Springfield Railway Company.

That prior to the formation of the Cincinnati, Indianapolis & Western Railway Company, the Indiana, Decatur & Western Railroad Company had placed a mortgage on its property in February of the year 1899, and a supplemental mortgage was made December 1, 1901; that by said mortgage the Indiana, Decatur & Western Railroad Company made all of its contracts, including the aforesaid contract dated September 20, 1883, and executed by the Indianapolis, Decatur & Springfield Railway Company on December 14, 1883, with The Indianapolis Union Railway Company, security for the bonds issued under said mortgage, which mortgage was assumed by the Cincinnati, Indianapolis & Western Railway Company in the consolidation, and the mortgage under said mortgage acquired an interest in said contract as a separate and distinct contract. Thereafter a general mortgage was placed upon the entire property of the Cincinnati, Indianapolis & Western Railway Company. Interest on the bonds issued under each of said mortgages was thereafter defaulted and foreclosure proceedings had in this court, and in foreclosing said mortgages two separate suits were filed and two separate decrees were entered, and that under these decrees the foreclosure sale was ordered by this Court and sale was had under both decrees, and separate deeds were executed in each case.

[fol. 10] That in the suit of the Central Trust Company of New York against the Cincinnati, Indianapolis & Western Railway Company, which was the suit to foreclose the mortgage of the Indiana, Decatur & Western Railroad Company above referred to, this court listed as property for sale under the said foreclosure proceedings, as item 11 under Section VI, the following:

"Contract dated September 20th, 1883, and amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis."

that at the time the said decree was entered, the mortgagees had no interest in the property east of Indianapolis, that in the suit of The Equitable Trust Company of New York against the Cincinnati, Indianapolis & Western Railway Company, which was a suit to foreclose the mortgage of the Cincinnati, Indianapolis & Western Railway Company, this court listed as property for sale under said foreclosure proceedings as item No. 14 under section VII the following:

"Contract dated September 20, 1883, and amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis."

that in the deed of the Special Master in the proceedings for the foreclosure of the Indiana, Decatur & Western Railroad Company mortgage, dated November 30, 1915, there is listed the following:

"Contract dated September 20, 1883, and amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis."

that in the deed of the Special Master in the proceedings for the foreclosure of the First and Refunding Mortgage of the Cincinnati, Indianapolis Railway Company there is listed the following:

"Contract dated September 20, 1883, and amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis."

Proceeding on the assumption and belief that there were two contracts as aforesaid, one of which was mentioned in each of said decrees of foreclosure and one of which was mentioned in each of said deeds your petitioner elected, as heretofore set out, to reject said contract of Sptember 20, 1883 and amendment of August 20, 1906, as set forth and described in the decree in the Indiana, Decatur & [fol. 11] Western Railroad Company foreclosure case, and as set forth in the deed of the Special Master in said case, and expressly adopted the contract made by the Cincinnati, Hamilton & Indianapolis Railway Company, as described in the decree and in the deed of the Special Master in the proceedings in the foreclosure of the First and Refunding Mortgage of the Cincinnati, Indianapolis & Western Railway Company.

Believing that there were two separate contracts as heretofore set out, and in ignorance of and/or mistaken as to its existing rights, interests, duties and liabilities under the aforesaid decrees of foreclosure, and under the aforesaid contracts, your petitioner, pursuant to what it believed its rights to be and what it believed the facts to be, and supposing it was following the proper course to avoid an unreasonable burden, in good faith rejected the one contract of the Indianapolis, Decatur & Springfield Railway Company as aforesaid and elected to adopt the other contract of the Cincinnati, Hamilton & Indianapolis Railroad Company, believing by said rejection it could reduce the amount of the fixed rental which its predecessor was obligated to pay under the two contracts from two parts of said rental to one part, two parts of said rental constituting an excessive and unreasonable burden upon your petitioner and an amount greatly in excess proportionately of your petitioner's use of the facilities of The Indianapolis Union Railway Company, and with the further belief that by the adoption of the one contract your petitioner would be required to pay bills of The Indianapolis Union Railway Company for fixed rental and operating and maintenance expenses as provided in the contract which was so adopted.

That thereafter The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and the Vandalia Railroad Company, the last of which companies has since been absorbed by the second of said companies, on October 24, 1916, filed their petition in this cause, setting out their identity, the agreement of September 20, 1883, and amendment thereto of August

20, 1906, between the proprietary companies and to which the associate companies became parties. Said petition further alleged the consolidation of the Cincinati, Hamilton & Indianapolis Railroad [fol. 12] Company and the Indiana, Decatur & Western Railroad Company into the Cincinnati, Indianapolis & Western Railway Company, and the payment of money from time to time under the provisions of said agreements of September 20, 1883 and as amended. Said petition further set out the acquisition of the property of the Cincinnati, Indianapolis & Western Railway Company by The Cincinnati, Indianapolis & Western Railroad Company, and the submission of said latter Company to the jurisdiction of this Court. Said petition futher alleged that after the purchase of the property of The Cincinnati, Indianapolis & Western Railroad Company, it sought to refuse and reject one of the two contracts existing by virtue of the agreements respectively of the Indianapolis, Decatur & Springfield Railway Company and the Cincinnati, Hamilton & Indianapolis Railroad Company, and in said petition denied the right of The Cincinnati, Indianapolis & Western Railroad Company to refuse and reject either of said two contracts and alleged that it was acting without warrant of law and contrary to the provisions and intent of said decree of foreclosure and was bound by both of said two contracts and therefore was required to make payment upon each of said two contracts of the full amount that would have been payable thereunder by the Indiana, Decatur & Western Railroad Company and the Cincinnati, Hamilton & Indianapolis Railroad Company, as if the consolidation had not been made, and if the property had not been sold under the decrees as aforesaid and the sale confirmed in The Cincinnati, Indianapolis & Western Railroad Company. After filing a motion to dismiss said petition, which was overruled, your petitioner filed answer thereto, setting up its action in cancelling one of said contracts as aforesaid and its authority for so doing. The Indianapolis Union Railway Company then filed its motion to strike out the answer and to strike from the answer, which motion was sustained by striking from the answer all that part pertaining to the rejection of the one contract as aforesaid, the court holding that your petitioner purchased two contracts, and rejected the entire Indianapolis, Decatur & Springfield contract, but that trains continued to run from the west into Indianapolis and since there had been no change in the use there should be no change in the payments, but that if your petitioner would give up the use contemplated by the contract then it would be [fol. 13] relieved from the payment required by the contract.

Thereafter a motion for leave to file an amended and supplemental answer was filed on October 24, 1916, the opinion of this Court upon said motion having been filed March 17, 1920, the court holding in substance that the attempt in the instrument of rejection filed in Indiana, Decatur & Western foreclosure case to adopt the former rights of the Cincinnati, Hamilton & Indianapolis Railroad Company was not effectual, as those rights were not covered by the mortgage foreclosed, and that although the first mortgage on the Indiana, Decatur & Western Railroad might have kept that company's terminal agreement alive, as a separate contract for the purposes of that

indenture, yet the purchaser by reason of the rejection took nothing thereby and that the case must turn upon the effect of the purchaser's action in the Cincinnati, Indianapolis & Western Railway foreclosure under the First and Refunding Mortgage. That by the consolidation of the Indiana, Decatur & Western Railroad Company and the Cincinnati, Hamilton & Indianapolis Railroad Company, the successor succeeded to their respective rights and obligations and thus the two contracts become one, and The Cincinnati, Indianapolis & Western Railroad Company could not cancel as to the obligations under one and at the same time insist upon the rights derived from the other; that all contracts not rejected within thirty days after entry of the decree were presumed to be adopted and as the rejection filed was not permissible under the decree, the purchaser must be assumed to have adopted the one contract found to have been sold.

Thereafter that part of the answer remaining not pertaining to the rejection of the one contract, was withdrawn without prejudice and upon refusal to plead further, judgment was entered against your petition, in substance, as follows: (R. 92)

"The attempted rejection filed, to accept in part and reject in part the said obligation, was not permissible under said decree and was ineffectual; that accordingly under the decree the purchaser became bound by the said contract of September 20, 1883, as amended August 20, 1906, as to all the obligations incurred by the signatures of both the Indianapolis, Decatur & Springfield Railway Company and the Cincinnati, Hamilton & Indianapolis Railroad Company and it is ordered that the said decree and proceedings thereunder be and are so construed."

[fol. 14] The case was thereupon appealed to the Circuit Court of Appeals and an opinion was rendered by said court on February 7th, 1922, holding in substance that the two rental contracts had become a single contract by reason of the consolidation of the Cincinnati, Hamilton & Indianapolis Railroad Company and the Indiana, Decatur & Western Railroad Company, and that therefore your petitioner by virtue of the foreclosure decree did not have the right to adopt the contract with the depot company in part and to reject it in part. The opinion in this case is reported in 279 Federal 356.

That the United States Supreme Court denied the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth District on the 1st day of May, 1922, (258 U. S. 629).

That until the decision of the Supreme Court of the United States denying certiorari, your petitioner did not know its rights and obligations arising from its said election and the decrees. If your petitioner had been aware that in making its election to adopt one contract and reject the other, it would thereby become obligated to pay two parts of the fixed rental instead of one, your petitioner would have rejected all obligations under both contracts for the reason that the payment of two parts of the fixed rental was then and is out of all proportion to the use petitioner ever made, now makes, or can make of the Union Railway facilities. By way of

example, your petitioner shows that during the year 1923 petitioner's actual use of said facilities in comparison with other proprietary and associate lines was five and eighty-one hundredths (5.81) per cent, while it was required to pay fifteen and sixty-five hundredths (15.65) per cent or One Hundred and Fifteen Thousand, Three Hundred and Nine and Sixty-six hundredths ($115,309.66) Dollars, an over-payment above what it would pay on a user basis, for the one year of $72,489.87. Such over-payment will continue to increase from year to year and has increased greatly since your petitioner purchased the property, to the end that if continued your petitioner will become insolvent.

Your petitioner shows that it is required to pay an amount based upon the same division as the fixed rental is divided from year to [fol. 15] year to be applied to a sinking fund for the retirement of certain securities of The Indianapolis Union Railway Company, and in addition is charged interest at the rate of four and one-half per cent (4½%) per annum on the total amount of said securities originally issued; and further that is required to pay two parts of the fixed rental on additions and betterments represented by track elevation work to which the City of Indianapolis and Marion County has contributed as provided by law an amount believed by your petitioner to exceed $1,500,000.00, said fixed rental being based upon the entire cost notwithstanding the actual investment of The Indianapolis Union Railway Company in said track elevation work is only a part of the entire cost. All of which was without the knowledge of your petitioner, and had it known that it would be compelled to pay all of these amounts by reason of the election filed in said foreclosure proceedings, it would have rejected all of the obligations and benefits under both contracts with The Indianapolis Union Railway Company.

Wherefore, your petitioner says that it was mistaken as to the facts surrounding the contract or contracts existing between its predecessors and The Indianapolis Union Railway Company and was mistaken as to its rights and obligations under said contract or contracts, its election and under the decrees hereinbefore mentioned, and, therefore, accepted or adopted the one contract which it did accept or adopt through and solely by reason of such mistakes. Your petitioner asks that The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company be notified of the filing of this petition and be required to show cause, if any, why your petitioner should not be permitted to rescind its acceptance of the said contract and that such rescission be ordered and that it be permitted to cancel all of the obligations arising under said contract or contracts dated September 20, 1883 and amendment of August 20, 1906 with The Indianapolis Union Railway Company, and that the foreclosure decree in this [fol. 16] case be modified to the extent necessary, and your petitioner prays such further relief as the equity of the case may require and as may seem meet.

(Signed) F. J. Goebel, Murray Seasongood, Solicitors for Petitioner. Cadwalader, Wickersham & Taft, of Counsel.

[fol. 17] [Title omitted]

U. S. MARSHAL'S RETURN OF CERTIFIED COPY OF ORDER AND PETITION OF C., I. & W. RAILROAD CO.—Filed July 21, 1924

Received this Writ at Indianapolis, Indiana, on July 1, 1924, and executed the same by serving personally and by copy together with attached petition, on P. J. Landers, Supt. I. U. R. R. Co. on July 7, 1924, at Indianapolis, Marion County, Indiana.

L. P. Meredith, U. S. Marshal. B. S. T. Hickman, Deputy.

Marshal's costs: 1 service, $2.00.

[fol. 18] [Title omitted]

U. S. MARSHAL'S RETURN OF CERTIFIED COPY OF ORDER AND PETITION OF C., I. & W. RAILROAD CO.—Filed August 6, 1924

U. S. Marshal's Return

On July 5, 1924, I served a copy of this Order together with copy of the within named Petition upon the within named The Cleveland, Cincinnati, Chicago & St. Louis Railway Company by delivering same to E. H. Banker, Executive Assistant to the Vice President of said Railway Company, by handing same to him personally at Cincinnati, Ohio.

And on the same day I served a like copy of this order and petition upon the within named The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by delivering same to R. C. Barnard, Superintendent, Cincinnati Division of said Railway Company, at Cincinnati, by handing same to him personally at Cincinnati, Ohio.

No higher chief officers of said companies found in this district upon whom to effect service.

Stanley Borthwick, U. S. Marshal, by John Theobald, Deputy, by J. Norrish, Deputy.

Fees:

2 services.....	$4.00 Order.
2 services.....	4.00 petition.
Exp. in lieu.....	.15
	$8.15

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL MOTION OF THE INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, AND THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY TO DISMISS THE PETITION OF THE CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY —Filed Sept. 10, 1924

In response to the order entered July 2, 1924, as extended by the order of July 11, 1924, to file answer or otherwise show cause why the prayer of the petition of The Cincinnati, Indianapolis & Western Railroad Company, filed on July 2, 1924, should not be granted, The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago, & St. Louis Railway Company, and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company move to dismiss said petition of The Cincinnati, Indianapolis & Western Railroad Company on the ground that it appears upon the face of said petition that the court is without jurisdiction to entertain the same, because the petition presents no federal question, and diversity of citizenship requisite to jurisdiction does not appear on the face of the [fol. 20] petition, which, although purporting to be a proceeding in the cause as above entitled, is in fact an independent suit de novo.

In the event that the foregoing motion should be overruled, these moving parties jointly and severally, without waiving their objection to the jurisdiction as above set forth, but relying on the same, and in the alternative only, move the court to dismiss said petition on the grounds that it appears on the face thereof:

1. That there is an insufficiency of facts to constitute a valid cause of action in equity;

2. That the opportunity of petitioner to exercise its rights, if any, to change the election or to modify the foreclosure decree with respect to the rejection of the contract or contracts now sought to be rejected, was exhausted by the prior proceedings in this court and on appeal;

3. That the alleged mistakes, from the consequences of which petitioner prays relief, are mistakes of law only, and not of fact;

4. That the petitioner has been guilty of laches, depriving it of the right to relief prayed in the petition, or to any relief in equity.

Maxwell & Ramsey, Baker & Daniels, L. J. Hackney, H. N. Quigley, Solicitors for the Indianapolis Union Railway Co., the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

[fol. 21] IN UNITED STATES DISTRICT COURT

EXHIBIT IN EVIDENCE

Decree for the Foreclosure of the First and Refunding Mortgage of Cincinnati, Indianapolis and Western Railway Company

(Entered by Judge Hollister June 29, 1915)

This cause came on to be heard at this term, upon the pleadings and proofs, and was argued by counsel, and thereupon, upon consideration thereof, the Court being fully advised in the premises,

It was ordered, adjudged and decreed as follows:

First. All and singular the allegations in the bill of complaint of the complainants The Equitable Trust Company of New York and Elias J. Jacoby, as Trustees, are true except as hereinafter set forth.

Second. The Equitable Trust Company of New York was at the time of the filing of the bill of complaint herein, and ever since has been, a corporation duly organized and existing under the laws of the State of New York and a citizen and resident of said state.

Elias J. Jacoby, is a citizen and resident of the State of Indiana, and a resident and inhabitant of the District of Indiana.

The defendant the Cincinnati, Indianapolis & Western Railway Company was at the time of the institution of this action and ever since has been a consolidated corporation, organized and existing under the laws of the States of Indiana and Illinois, and is a citizen and resident of the State of Indiana and a resident and inhabitant of the District of Indiana.

The defendant The Cincinnati, Hamilton and Dayton Railway Company was, at the time of the institution of this action and ever since has been, a consolidated corporation, organized and existing under the laws of the State of Ohio, and is a citizen and resident of the State of Ohio, and a resident and inhabitant of the Southern District of Ohio, Western Division.

The defendants Judson Harmon and Rufus B. Smith are, and each of them is, a citizen and resident of the State of Ohio, and a resident and inhabitant of the Southern District of Ohio, Western Division.

Third. Heretofore and under date of December 1, 1902, the defendant Cincinnati, Indianapolis and Western Railway Company (hereinafter termed the Consolidated Company) in order to secure the payment of the principal and interest of an issue of bonds known as its "First and Refunding Mortgage Gold Bonds," duly made, [fol. 22] executed and delivered to North American Trust Company, a corporation organized under the laws of the State of New York, and to the complainant Elias J. Jacoby, as trustees, its certain indenture of mortgage and deed of trust known as its First and Refunding Mortgage wherein and whereby the Consolidated Company granted,

bargained, sold, released, conveyed, assigned, transferred and set over unto the said North American Trust Company and Elias J. Jacoby and their successors, as trustees, all the lines of railway, property, franchises, interests, equipment and other property described in said First and Refunding Mortgage and in Article Eighth of the bill of complaint herein. A true copy of the First and Refunding Mortgage is annexed to the bill of complaint herein as Exhibit A.

Fourth. Subsequent to the date of the execution and delivery of said First and Refunding Mortgage of the Consolidated Company, and on or about May 8, 1905, said North American Trust Company was, pursuant to the provisions or the Banking Laws of the State of New York, duly merged into The Trust Company of America, a corporation organized under the laws of the State of New York. Thereafter and on February 9, 1912, said The Trust Company of America was, pursuant to the provisions of the Banking Laws of the State of New York, duly merged into The Equitable Trust Company of New York, one of the complainants herein. By reason of said mergers the complainants The Equitable Trust Company of New York and Elias J. Jacoby have been and now are the trustees under the said First and Refunding Mortgage of the Consolidated Company.

Fifth. The First and Refunding Mortgage was duly executed, acknowledged and delivered in all respects in conformity with law, and the complainants and their predecessors in the trusts duly accepted the trusts created in and by said mortgage before the record of the same, and said mortgage was thereafter duly recorded as required by law.

Sixth. The First and Refunding Mortgage was the proper act and deed of the Consolidated Company, and was by it duly made, executed and delivered in all respects in conformity with law, and the same was and now is a valid conveyance for the purposes therein stated, and now constitutes a valid and subsisting lien upon all the property therein mortgaged as hereinbefore set forth, and upon all other property which has become subject to the lien of the First and Refunding Mortgage.

[fol. 23] Seventh. On or about August 1, 1902, the Consolidated Company was duly formed by the consolidation under the laws of the States of Indiana and Illinois of The Indiana, Decatur and Western Railway Company, a consolidated corporation organized and existing under the laws of the States of Indiana and Illinois, and of Cincinnati, Hamilton and Indianapolis Railroad Company, a corporation organized and existing under the laws of the State of Indiana.

Eighth. Since the date of the execution and delivery of the First and Refunding Mortgage the Consolidated Company has from time to time acquired certain property which has become subject to the lien of the First and Refunding Mortgage, and which is in-

cluded in the description of the property hereinafter described and directed to be sold.

Ninth. From time to time since the date of the First and Refunding Mortgage there have been duly authenticated and delivered, as provided in the First and Refunding Mortgage, $4,722,000 face amount of the First and Refunding Mortgage Gold Bonds. All of said bonds were duly issued and are now outstanding in the hands of divers persons who are bona fide holders thereof for value, and all of said bonds are the lawfully created, valid, binding and subsisting obligations of the Consolidated Company.

Tenth. Heretofore and under date of November 1, 1895, and prior to the formation of the Consolidated Company, The Indiana, Decatur and Western Railway Company executed and delivered to Central Trust Company of New York, a corporation organized under the laws of the State of New York, and Augustus L. Mason, as trustees, its certain indenture of mortgage and deed of trust known as its First Mortgage, and its two certain supplemental mortgages to the same trustees, dated respectively February 4, 1899, and December 1, 1901, and secured the assignment to the said trustees of a certain collateral mortgage dated May 19, 1894, executed by one George Sherman to Central Trust Company of New York, as trustee, all to secure an issue of bonds of Indiana, Decatur and Western Railway Company known as its First Mortgage bonds. In and by said First Mortgage and said two supplemental mortgages and said collateral mortgage (hereinafter referred to collectively as the First Mortgage) The Indiana, Decatur and Western Railway Company granted, bargained, sold, assigned, released and con- [fol. 24] veyed unto the said Central Trust Company of New York and Augustus L. Mason, as trustees, certain railroads and property of the Indiana, Decatur and Western Railway Company.

Eleventh. Heretofore and under date of June 17, 1912, an agreement was entered into between the Consolidated Company and the defendant The Cincinnati, Hamilton and Dayton Railway Company (hereinafter termed the Cincinnati Company) wherein and whereby it was provided, among other things, that the railroads and other property of the Consolidated Company should be operated by the Cincinnati Company. In pursuance of said agreement the Cincinnati Company operated the said railroads and other property of the Consolidated Company and continued in possession thereof and did operate the same until on or about July 2, 1914, when receivers of the Cincinnati Company were appointed as hereinafter set forth.

Twelfth. Under date of August 5, 1914, an instrument in writing was entered into between the defendants, Judson Harmon and Rufus B. Smith as receivers of the Cincinnati Company, as parties of the first part, and the Consolidated Company as party of the second part, a true copy of which said instrument is annexed to the bill of complaint herein as Exhibit B. Ever since said 5th day of August, 1914, said receivers have been and now are in posses-

sion of and engaged in the operation and management of the lines of railroad and other property of the Consolidated Company and have collected and received and are collecting and receiving all the revenues, tolls, rents, issues, profits and income arising from the operation and use of the said lines of railroad and other property. By reason of the premises this Court, through the said Harmon and Smith as receivers, now has the custody and control and is in possession of the property of the Consolidated Company within the jurisdiction of this Court, including the property subject to the lien of the said First and Refunding Mortgage.

Thirteenth. An installment of interest on the First and Refunding Mortgage Gold Bonds became due and payable on July 1, 1914, and default was made by the Consolidated Company in the payment of said installment of interest and such default still continues.

Fourteenth. On October 19, 1914, said default in the payment of the installment of interest due July 1, 1914, on the First and Refunding Mortgage Gold Bonds having continued for a period of three months and more, the owners and holders of a majority of the [fol. 25] said bonds outstanding by notice in writing delivered to the Consolidated Company, and to the complainants herein, duly declared the principal of all the First and Refunding Mortgage Gold Bonds to be forthwith due and payable, and the same thereupon became and now is due and payable, and no part thereof has been paid.

A cause in equity, in which the same relief is prayed as is prayed in this cause in this Court, is also pending in the following District Courts of the United States, as courts of ancillary jurisdiction, to-wit:

For the District of Indiana;

For the Eastern District of Illinois;

For the Southern District of Illinois, Southern Division.

Fifteenth. On or about July 2, 1914, a bill of complaint in equity was filed in this Court in a suit wherein the Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, was complainant, and the Cincinnati Company, defendant herein, was defendant, alleging among other things that default had been made by the Cincinnati Company in the payment of interest due July 1, 1914, upon certain bonds issued and outstanding under a certain mortgage theretofore executed and delivered by the Cincinnati Company to the said Bankers Trust Company as trustee, and alleging further that the Cincinnati Company was insolvent, and praying, among other things, for the appointment of receivers of the Cincinnati Company. By an order of this Court made and filed on or about July 2, 1914, the defendants Judson Harmon and Rufus B. Smith were appointed receivers of the Cincinnati Company and of all the railroads and other property and assets real, personal or mixed, of whatever kind and description, and wherever situated, owned by the Cincinnati Company, including all tracks, terminal facilities, warehouses, offices, stations, shops

and all buildings and appurtenances of every kind, and all locomotives, cars and other rolling stock and equipment and all tools, machinery, implements, furniture, fuel, materials and supplies, and all books of account, records and other books, papers and accounts, cash in banks, on deposit and in hand, money, debts, notes in action, credits, stocks, bonds, securities (other than such as were pledged with and held by the complainant in said suit, as trustee under the mortgage set forth in the bill of complaint therein), deeds and leases, contracts, hereditaments, titles, bills receivable, rents, issues and profits and income accruing and to accrue, as well as all [fol. 26] leasehold interests and operating and other contracts, and all rights, interest, easements, privileges and franchises of the Cincinnati Company and all other assets of every kind, with power and authority immediately to take possession of the same, and to rent, manage and operate the said railroads and property wherever situated or found, including such railroads and property as the Cincinnati Company held, controlled or operated under lease or otherwise. The defendants Judson Harmon and Rufus B. Smith qualified as such receivers and took possession of the said railroads, property, leasehold interests, operating and other contracts, including the railroads and property of the Consolidated Company theretofore in the possession of and operated by the Cincinnati Company as provided in the agreement of June 17, 1912, hereinbefore referred to, all of which said railroads and property of the Consolidated Company are subject to the lien of the First and Refunding Mortgage.

Sixteenth. The amount due, owing and unpaid by the defendant Consolidated Company to the complainants and to the holders of the First and Refunding Mortgage Gold Bonds at the date of this decree for principal and interest upon the First and Refunding Mortgage Gold Bonds, together with interest thereon, is the following sum, namely:

Installment of interest or coupons due July 1, 1914..	$94,440.00
Interest thereon from July 1, 1914, to the date of this decree at six per cent per annum.....	5,634.92
Principal of First and Refunding Mortgage Gold Bonds	4,722,000.00
Interest on said principal amount of First and Refunding Mortgage Gold Bonds from July 1, 1914, to October 19, 1914, at the rate of four per cent, per annum, and from October 19, 1914, to the date of this decree at six per cent per annum.....	253,823.69
Total	$5,075,898.61

Seventeenth. The railways and other property subject to the lien of the First and Refunding Mortgage constitute one single property consisting of a railway and it appurtenances, and should be conducted as a single enterprise, and it is for the interest of all parties that the said railways and property be sold as an entirety in one lot or parcel, subject to the lien of the First Mortgage of Indiana,

[fol. 27] Decatur and Western Railway Company, so far as the lien of said First Mortgage is prior to the lien of said First and Refunding Mortgage upon any of the railways and properties covered by said First and Refunding Mortgage. The value of such property in portions or sections is and will be much less than its value as a whole and said mortgaged railways and property are so constituted that the same can not be sold in separate lots or parcels without great and irreparable loss and sacrifice.

Eighteenth. The property subject to the lien of the First and Refunding Mortgage consists of the premises, property and franchises hereinafter described and directed to be sold, and is hereinafter termed the Mortgaged Property.

Nineteenth. The interest of the defendants and of each of them in and to the Mortgaged Property is subsequent and junior to the interest of the complainants therein, except so far as otherwise determined by order of this Court in this cause, dated May 27, 1915, and except in so far as any claim on the part of the defendants Judson Harmon and Rufus B. Smith as Receivers of the Defendant, The Cincinnati, Hamilton & Dayton Railway Company, or on the part of said defendant Cincinnati Company, may hereafter be adjudged and determined in this suit to be prior or superior to the First and Refunding Mortgage, in accordance with the provisions hereinafter in this decree set forth in regard to the filing, proof and allowance of debts, claims and charges alleged to be entitled to such priority or superiority.

Twentieth. No proceedings have been had at law or in equity for the collection of the debt secured by the First and Refunding Mortgage, save this suit.

It is therefore ordered, adjudged and decreed as follows:

(1) The defendant Cincinnati, Indianapolis & Western Railway Company shall, within five days after the entry of this decree, pay or cause to be paid to the complainants The Equitable Trust Company of New York and Elias J. Jacoby, as trustees, the sum of $5,075,898.61, with interest thereon at the rate of six per centum per annum from the date of this decree to the date of payment, being the sum now due and unpaid by the defendant Cincinnati, Indianapolis & Western Railway Company and secured by the First and Refunding Mortgage. If the above payments shall be made any of the parties to this suit may apply to this Court for such further directions as shall be just and equitable.

[fol. 28] In default of such payment within the time directed as aforesaid, the Mortgaged Property shall be sold as hereinafter directed, and all the estate, right, title and equity of redemption of the defendant Cincinnati, Indianapolis & Western Railway Company and of the other defendants herein and of all persons claiming under them or any of them, of, in and to the Mortgaged Property, and every part thereof, shall be forever barred and foreclosed; provided, however, that the foregoing shall not in any manner limit or restrict the right of the Court to retake and resell the Mortgaged

Property as hereinafter provided, in the event of default on the part of the purchaser in the payment of any part of the purchase price.

(2) Said sale shall be made without valuation, appraisement, redemption or extension, and shall be made by and under the direction of Noble C. Butler, Esq., who, by reason of his special qualification for that purpose, is hereby appointed Special Master for that purpose, and who is directed to make and conduct said sale and to execute a deed or deeds of conveyance or assignment and transfer of the property sold to the purchaser or purchasers thereof or his or their assigns forever upon an order of this Court confirming such sale and upon payment or settlement of the purchase price as hereinafter provided. The Special Master hereby appointed shall give a bond satisfactory to the Court, in the sum of $10,000, for the faithful discharge and performance of his duties as such Special Master.

Said sale shall be made at public auction in the City of Indianapolis, County of Marion, State of Indiana, upon the mortgaged premises, on a day and hour to be fixed by said Special Master at the request of the solicitors for the complainants, and notice of the time and place and terms of said sale, describing briefly the property to be sold and referring intending purchasers to this decree for a particular description of the property to be sold, shall be published at least once a week for four successive weeks preceding the date of sale in a newspaper published in the City of New York, N. Y., in a newspaper published in the City of Cincinnati, Ohio, in a newspaper published in the City of Indianapolis, Indiana, and in a newspaper published in the City of Springfield, Illinois.

Said Special Master shall at the request of the solicitors for the complainants adjourn or postpone said sale and may without further notice or advertisement proceed with the sale on any day to which [fol. 29] the same may have been adjourned; and he may give such further notice of sale in addition to the notice above-described or of any adjournment thereof as the solicitors for the complainants may request.

The Mortgaged Property shall be sold subject to the lien of any and all taxes, assessments and water rates levied or assessed against the Mortgaged Property or any part thereof and subject to any other statutory liens against the Mortgaged Property or any part thereof which shall finally be determined by this Court to be chargeable upon the Mortgaged Property or any part thereof prior to the lien of the First and Refunding Mortgage, and also subject to the lien of the said First Mortgage. The Mortgaged Property shall however be sold free and clear of any and all debts, claims and charges other than those above specified, and any and all such other debts, claims and charges which may hereafter be adjudged by this Court to be prior or superior to the First and Refunding Mortgage shall be payable out of the proceeds of sale of the Mortgaged Property as hereinafter provided, all questions relating to the priority or superiority of any and all such debts, claims and charges being hereby expressly

reserved for further hearing and determination except so far as the same have been determined by order of this Court in this case dated May 27, 1915.

(3) The Mortgaged Property shall be offered for sale in one block or parcel and as an entirety, subject to the lien of the said First Mortgage of Indiana, Decatur and Western Railway Company, so far as the lien of said First Mortgage is prior to the lien of said First and Refunding Mortgage upon any of the railways and properties covered by said First and Refunding Mortgage. The Special Master shall receive no bid from anyone offering to bid who shall not, at least twenty-four hours before the time appointed for the said sale, deposit with him as a pledge that he will make good his bid in case of its acceptance either (a) the sum of $25,000 in cash or by certified check on some national bank or trust company in the City of New York acceptable to the Special Master and made or endorsed payable to his order, or (b) in lieu of said deposit in cash or by check, $50,000 face amount of First and Refunding Mortgage Gold Bonds in bearer form, and accompanied by the coupon due July 1, 1914, and all subsequent coupons. Such deposit may, however, be partly in cash or certified check and partly in First and Refunding Mortgage Gold Bonds, but in the above relative proportions. The deposit re- [fol. 30] ceived from any unsuccessful bidder shall be returned to him when the property shall be struck off. The deposit received from the successful bidder shall be applied on account of the purchase price of the Mortgaged Property.

The Special Master shall accept no bids for the Mortgaged Property for less than the sum of $2,100,000, and he shall accept the highest bid received (equal or exceeding the said sum of $2,100,000), and shall knock down the Mortgaged Property sold to such bidder subject to confirmation of the sale by the Court.

Upon the acceptance of any bid by the Special Master, the bidder whose bid shall have been accepted shall forthwith deposit with the Special Master, as a further pledge that his bid will be made good and in addition to the cash or First and Refunding Mortgage Gold Bonds deposited in order to qualify him to bid at the sale, as hereinbefore provided, either (a) the additional sum of $75,000 in cash or by certified check on some national bank or trust company in the City of New York acceptable to the Special Master and made or endorsed payable to his order, or (b) in lieu of said deposit in cash or by certified check, $150,000 face amount of First and Refunding Mortgage Gold Bonds in bearer form and accompanied by the coupon due July 1, 1914, and all subsequent coupons. Such deposit may, however, be partly in cash or certified check and partly in First and Refunding Mortgage Gold Bonds, but in the above relative proportions.

All amounts in cash paid to the Special Master as herein provided shall be deposited by him with The Equitable Trust Company of New York.

In lieu of any deposit of First and Refunding Mortgage Gold Bonds with the Special Master permitted by this paragraph (3) of

this decree the Special Master may accept the certificate of the complainant, The Equitable Trust Company of New York, that it holds subject to his order the amount specified in said certificate of First and Refunding Mortgage Gold Bonds in bearer form and accompanied by the coupons therein stated.

Any owner or holder of First and Refunding Mortgage Gold Bonds may bid or purchase at the sale.

The Court reserves the right to reject any or all bids received and to confirm and direct the consummation of any sale in accordance with the provisions of this decree.

(4) In case any bidder after the acceptance of his bid by the Special Master shall fail to make the additional deposit, either in cash, by check or in First and Refunding Mortgage Gold Bonds [fol. 31] hereinbefore required, or shall fail after such acceptance to comply within the period of twenty days with any order of the Court requiring or relating to the payment of the balance of the purchase price or any part thereof, then the sums deposited by such accepted bidder or bidders, as hereinbefore provided, whether in cash or by check or represented by First and Refunding Mortgage Bonds, shall be forfeited as a penalty for such failure, and shall be applied to the payment of the expenses of a re-sale and toward making good any deficiency or loss in case the Mortgaged Property shall be sold at a less price on any such re-sale, and to such other purposes as the Court may direct. If the Court shall not confirm the sale the deposits made by the accepted bidder shall be forthwith returned to such bidder.

(5) The purchaser shall on confirmation of the sale by the Court make such further payment or payments in cash on account of the purchase price as the Court may from time to time direct. So much of the purchase price as may not be required by the Court to be paid in cash may either be paid in cash or the purchaser may satisfy and make good such residue of his bid in whole or in part by turning over to be cancelled or credited, as hereinafter provided, First and Refunding Mortgage Gold Bonds and the coupons thereunto appertaining which matured July 1, 1914.

The said purchaser shall be credited on account of the purchase price for First and Refunding Mortgage Gold Bonds and the coupons thereunto appertaining which matured July 1, 1914, such sum as would be paid in cash upon such First and Refunding Mortgage Gold Bonds and coupons, respectively, out of the proceeds of sale if the whole amount of the purchase price had been paid in cash.

The Court reserves the right to re-sell the Mortgaged Property upon such notice as it may direct, at the risk and cost of the purchaser, in case the purchaser thereof shall fail or omit to make any payment on account of the purchase price within twenty days after the entry of the order requiring such payment.

The purchaser, his successors and assigns, shall not be required to see to the application of the purchase money, and shall have the right to enter his appearance in this Court and to become a party to this cause.

Frank O. Suire, Esq., who is hereby appointed Master Commissioner for the purpose shall, within twenty days after the transfer of possession of the property sold under this decree to the purchaser, [fol. 32] his successors or assigns, publish once a week for four successive weeks in a newspaper published in the City of New York, N. Y., in a newspaper published in the City of Cincinnati, Ohio, in a newspaper published in the City of Indianapolis, Indiana, and in a newspaper published in the City of Springfield, Illinois, a notice requiring holders of claims for unpaid debts, claims and charges claiming priority over the First and Refunding Mortgage (other than the liens and charges set forth in paragraph numbered (2) of this decree subject to which the Mortgaged Property is to be sold) to file with him as Master Commissioner for allowance itemized and verified proofs in writing of such claims, and any such claims which shall not be so filed within the period of four months after the first publication of said notice shall not be paid out of the proceeds of sale nor be enforceable against the Mortgaged Property, or any part thereof or against the purchaser or his successors or assigns, except that by leave of Court, claims so filed may be amended at any time prior to distribution of the proceeds of sale.

Said Master Commissioner shall report to this Court all debts, claims and charges which he shall allow as entitled to priority over the First and Refunding Mortgage, and shall have all the powers and duties of a Master in Chancery under the rules and procedure in equity, and shall return with his report all evidence taken by him under this reference, together with his findings of fact and conclusions of law thereon.

The purchaser and his successors or assigns as well as all parties and claimants shall have the right to contest any and all claims, demands and allowances herein or the preference or priority thereof, and may appeal from any and all decisions relating to any such claim, demand or allowance.

The purchaser and his successors or assigns shall have the right, for the period of thirty days after the delivery of the deed or instruments of transfer from the Special Master hereinafter provided for, to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this Court within said period of thirty days.

The purchaser and his successors or assigns shall have the right to elect not to take any part of the Mortgaged Property by written notice to the Special Master given at any time prior to the execution [fol. 33] and delivery of the deed or instruments of transfer from the Special Master, hereinafter provided for. No such election by the purchaser, his successors or assigns, shall diminish or affect the purchase price to be paid by the purchaser. The deed or instruments of transfer to be given by the Special Master, the defendants herein and the complainants, as herein provided, shall expressly except

therefrom any and all property which the purchaser, his successors or assigns, shall so elect not to take.

(6) The funds arising from the sale of the Mortgaged Property shall be applied as follows:

(A) First, to the payment of the costs of this cause, the proper expenses attendant upon the sale, including compensation of the Special Master and the Master Commissioner, and payment of all charges, compensation, allowances and disbursements of the complainants, The Equitable Trust Company of New York, and Elias J. Jacoby, as Trustees under the First and Refunding Mortgage and their solicitors and counsel. All questions relating to the amount of compensation, allowances, costs, disbursements and expenses are hereby respectively reserved by the Court for further hearing and determination, and all payments to be made under this subdivision (A) shall be hereafter determined, fixed, allowed and settled by the Court. Any of the amounts payable under this p-ragraph (A) may, with the consent of the party or parties entitled to receive the same, be assumed and paid by the purchaser or purchasers at said sale, his or their successors or assigns;

(B) Second, to the payment of any and all debts, claims and charges which may be filed with the Master Commissioner as provided in paragraph numbered (5) of this decree within the time therein limited and which may hereafter be adjudged in this cause to be prior or superior to the First and Refunding Mortgage. Except as provided by order of this Court in this cause, dated May 27, 1915, all questions relating to the priority or superiority of any and all such debts, claims and charges are hereby respectively reserved and referred by the Court for further hearing and determination to said Master Commissioner as hereinbefore provided, and all payments to be made under this subdivision (B) shall be hereafter determined, fixed, allowed and settled by the Court, after the filing of said report and exceptions thereto, if any.

(C) Third, the residue of such purchase price, after payment of the amounts provided for in preceding subdivisions (A) and [fol. 34] (B), if sufficient to pay the same in full, shall be applied to the payment of the amount found due for principal and interest upon the $4,722,000 face amount of First and Refunding Mortgage Gold Bonds issued and outstanding, with interest thereupon at the rate of six per cent per annum from the date of this decree to the date fixed for the payment thereof. The amounts so payable in respect of the First and Refunding Mortgage Gold Bonds and the coupons which matured July 1, 1914, appurtenant thereto, shall be apportioned between said First and Refunding Mortgage Gold Bonds and coupons which matured July 1, 1914, appurtenant thereto, in proportion to the respective amounts due thereon and without distinction between Bonds and coupons.

If, however, the said residue of said proceeds of said sale is insufficient to pay said amounts in full, then and in that case the said residue of said proceeds of sale shall be applied towards the

payment of the amount found due for principal and interest upon the $4,722,000 face amount of First and Refunding Mortgage Gold Bonds issued and outstanding. Said amount shall be distributed among the holders of the First and Refunding Mortgage Gold Bonds and the coupons which matured July 1, 1914, thereunto appertaining, in proportion to the amount due on said Bonds and coupons and without any other preference or priority whatsoever.

All First and Refunding Mortgage Gold Bonds and coupons paid in full on the distribution of the proceeds of sale shall be forthwith cancelled by the Special Master and held by him subject to the further order of the Court. If said Bonds and coupons be not paid in full they shall be stamped by or under the direction of the Special Master so as to indicate the amount paid thereon and returned to the respective owners and holders thereof;

(D) Fourth, if after making the foregoing payments there shall be any surplus, the same shall be applied as the Court shall hereafter instruct or direct.

(7) When the Special Master shall be prepared to pay out the proceeds of sale he shall give notice of the time and place when and where he will make such payment, by publication at least once a week for three successive weeks in a newspaper published in the City of Cincinnati, Ohio, and in a newspaper published in the City of New York, N. Y. No holder of First and Refunding Mortgage Gold Bonds or coupons who shall fail to present the same for pay-[fol. 35] ment at the time and place specified in such notice shall be entitled to payment of any interest thereon after the date so fixed, out of the proceeds of sale or otherwise. The said Special Master may make such payment at any place most convenient to him, either personally or through the complainant, The Equitable Trust Company of New York.

(8) Upon confirmation of sale and the payment of the purchase price by the purchaser, his successors or assigns, or upon making such provision for the payment thereof as the Court may approve, the Special Master shall execute a deed or deeds or other proper instruments conveying, assigning and transferring the Mortgaged Property (except such part thereof, if any, as the purchaser, his successors or assigns, shall have elected not to take in accordance with the provisions in such respects contained in paragraph numbered (5) of this decree) to such purchaser, his successors and assigns, and upon the production of such deed or deeds and assignments of transfer, or a certified copy or copies thereof, the grantee or grantees therein named shall be let into the possession of the property so conveyed or transferred. The complainants shall thereupon be discharged of their trust in the premises, subject nevertheless, to the condition that the Court may re-take and re-sell the property conveyed or transferred in case the purchaser, his successors or assigns, shall fail within the time limited to pay the balance of any purchase price remaining unpaid. The purchaser, his successors and assigns, shall after such delivery of possession hold, possess and enjoy the property conveyed and transferred and every part and parcel thereof

free from the trust and lien imposed thereon by the First and Refunding Mortgage, and free from any estate, right, interest or equity of redemption of, in or to the same by the defendants herein, or any of them, their and each of their successors and assigns, and all persons claiming by, under or through them or any of them.

(9) The defendant, Cincinnati, Indianapolis & Western Railway Company, shall, at the time of the execution of said deed or deeds by the Special Master, as a further assurance to the purchaser, his successors and assigns, execute and deliver a similar deed or deeds or other conveyance, or join with the Special Master in the execution of the deed or deeds to be made by him, and shall thereby convey, transfer, assign and release to the purchaser, his successors and assigns, all and singular their respective estate, right, title and interest of, in and to the property conveyed, assigned and transferred to the [fol. 36] said purchaser by said Special Master, and the complainants, as Trustees under the First and Refunding Mortgage, shall, by proper instrument, release unto said purchaser, his successors and assigns, all and singular their estate, right, title and interest as Trustees as aforesaid of, in and to the property so conveyed.

(10) In case the proceeds of sale applicable thereto shall not be sufficient to pay in full the amount hereinbefore found to be due and unpaid for or in respect of the principal and interest upon the $4,722,000 face amount of First and Refunding Mortgage Gold Bonds and coupons, together with interest thereon, then the Special Master shall report to the Court the amount of any such deficiency, and the complainants shall have judgment against the defendant Cincinnati, Indianapolis & Western Railway Company for the amount of such deficiency, the Court expressly reserving for its future determination the amount of any such deficiency which said defendant Railway Company is liable to pay. The complainants shall be entitled to execution on any such judgment for deficiency in accordance with the direction of this Court.

(11) All questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this Court for further relief at the foot of this decree.

(12) The following is a description of the Mortgaged Property hereinbefore and now directed to be sold:

I

[fol. 37] And the Court hereby reserves for further determination in this suit all questions heretofore raised therein as to a claim of title by the defendant, The Cincinnati, Hamilton and Dayton Railway Company or its Receivers in or to said property described in the foregoing paragraph numbered 29. The contract between the Cincinnati, Indianapolis and Louisville (Monon) R. R. and C. H. & D., for joint use of property in Indianapolis, including said property described in the foregoing paragraph numbered 29, dated January 23, 1899, shall pass to the purchaser should he pursuant to

said further determination of this court become entitled to said property number 29.

VI

The following described rolling stock and equipment:

Locomotives

Old No.	New No.	Built	Type	No.
L., D & W. 24	C., H. & D. 95	1895	6 Wh. Sw.	1
" 4	" 269	1895	Mogul	1
" 8	" 270	1895	Mogul	1
C., H. & I. 203	" 203	1887	Am. 8 Wh	1
" 204	" 204	1888	Am. 8 Wh	1
				5

[fol. 38]

Passenger Equipment

Old No.	New No.	Built
L., D. & W. 10	C., H. & D. 17	1880
" 12	" 19	1880
" 14	" 24	———
" 18	" 28	1880
" 20	" 30	———
" 22	" 32	1895
" 24	" 34	1895
" 41	" 241	1880
" 45	" 245	1901
" 46	" 305	1877
" 33	" 308	1880
" 34	" 309	1880
" 35	" 310	1880
" 38	" 248	1889
" 36	" 249	1889
C., H. & I. 78	" 300	1868
" 79	" 301	1868
" 80	" 253	1868
" 113	" 232	1875

Passenger Equipment—Continued

Type	No.
Coach	1
"	1
"	1
"	1
"	1
"	1
"	1
Pass. & Baggage	1
" "	1
Mail & Baggage	1
" "	1
" "	1
" "	1
Baggage	1
"	1
Mail & Baggage	1
" "	1
Baggage	1
Pass. & Baggage	1
	19

[fol. 39]

Freight Equipment

L., D. & W.	C., H. & D.	Class	No. cars
1022	5043	Box	1
1016	5044	"	1
1018	5046	"	1
2004	5306	"	1
2002	5307	"	1
2005	5308	"	1
449 to 545	5400 to 5441	Brick	4
549 to 597	5560 to 5584	Gondola	21
12000 to 12499	12000 to 12499	Box	449
17000 to 17999	17000 to 17999	"	866
			1346

Miscellaneous Equipment

L., D. & W.	C., H. & D.	Class	No. cars
8	x-4107	Camp Coach	1
110	x-4106	" "	1
111	x-4104	" "	1
17421	-155	Tool Car	1
17518	x-281	Camp Box	1
17763	x-3906	" "	1
17397	x-3921	" "	1
17153	x-3995	" "	1
17010	x-3996	" "	1
17630	x-3997	" "	1
17983	x-3998	" "	1
17291	x-3999	" "	1
			12

VII

The following described contracts:

1. Contract between Big Four, I. D. & W. and White River Railroad Company, dated March 6, 1900, providing for operation and maintenance of tracks and crossings at Blackford and Georgia Streets in Indianapolis.

2. Contract between I. D. & W. and Toledo, St. Louis & Kansas City Rwy., dated August 1, 1889, for crossing at Metcalfe, Illinois.

3. Contract between I. D. & W. and Indianapolis Union Railway Company, dated December 12, 1909, for operation of additional track of Belt Railway across I. D. & W. at Indianapolis.

4. Contract between I. D. & W. and Chicago & Eastern Illinois Rwy. Company, dated June 26, 1891, and supplemental agreement dated February 4, 1898, for crossing at Tuscola, Illinois

[fol. 40] 5. Contract between I. D. & W., Chicago & Eastern Illinois R. R., and Illinois Central Railroad, date June 12, 1900, for interlocker at Tuscola, Illinois, and supplement dated April 24, 1914.

6. Contract between I. D. & W. and Illinois Central Railroad, dated July 26, 1901, for a second main track crossing at Tuscola, Illinois.

7. Contract between Union County, Indiana, and C. H. & I., dated November 4, 1899, for change in location of a highway crossing in Union County, Indiana.

8. Correspondence between C. H. & D., and P. C. C. & St. L. Railway Company constituting contract covering maintenance of crossing with Belt Line at Indianapolis, Indiana. Correspondence covers period ending July 24, 1896.

9. Contract between I. D. & W. and Terre Haute & Indianapolis Rwy., dated March 12, 1900, for interlocker at Casey, Illinois.

10. Contract between I. D. & W. and Charles Alger and others, dated June 29, 1903, giving the railroad the right to change the channel of Flat Rock River at Rushville, Indiana.

11. Correspondence and permit referring to contract between Big Four Railroad and I. D. & W. relative to interlocker at Kansas City, Illinois, dated November 23 and 28 and December 2, 1895, although the permit was granted in 1892.

12. Contract between Illinois Central R. R. and I. D. & W. dated July 9, 1902, covering track at Springfield, Illinois.

13. Contract between C. I. & W. and Southern Indiana R. R., dated July 20, 1905, for crossing at Dana, Indiana.

14. Contract dated September 20, 1883, and amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis.

15. Two (2) contracts between C. I. & W. and Indianapolis & Cincinnati Traction Company, both dated May 27, 1904, for crossings at Morgan Street, Rushville, and near Irvington, Indiana.

16. Contract between Illinois Central Traction Company and C. I. & W. dated May 21, 1904, for crossing McCreery Avenue, Springfield, Illinois.

17. Contract between C. I. & W. and Toledo, St. Louis & Western Rwy. dated November 22, 1904, for joint use of station at Metcalfe, Illinois.

18. Contract between Wabash R. R. and Springfield & Decatur Rwy., dated June 30, 1902, covering crossing near property of Re- [fol. 41] publican Iron & Steel Company in Springfield, Illinois.

19. Contract between C. I. & W. and Indianapolis & Cincinnati Traction Company, dated September 8, 1903, for side track at Rushville, Indiana.

20. Contract between Springfield & Decatur Rwy. and Chicago, Peoria & St. Louis R. R., dated February 21, 1902, for crossing of tracks at Springfield, Illinois.

21. Contract between I. D. & W. and Springfield Consolidated Rwy. Co., dated August 30, 1902, for 11th Street crossing at Springfield, Illinois.

22. Contract between C. I. & W. and Chicago & Alton Rwy. Company, dated September 25, 1902, for joint facilities at Springfield, Illinois.

23. Contract between Springfield & Decatur Rwy. Co. and Capitol Coal Company for crossing of tracks in East Springfield, Illinois, dated November 26, 1901.

24. Contract between I. D. & W. and B. & O. S. W. dated June 12, 1902, for use of tracks at East Springfield, Illinois.

25. Contract between Illinois Central, B. & O. and I. D. & W. dated July 2, 1902, for interlocker at East Grand Avenue, Springfield, Ill.

26. Contract between I. D. & W. and Chicago & Eastern Ill. Rwy., dated April 19, 1909, covering ownership of interchange track at Hillsdale, Indiana.

27. Contract between C. I. & W. and Springfield Belt Railway Co., dated September 24, 1910, covering construction of crossing and interlocker at Springfield, Illinois.

28. Contract between C. I. & W. and Vandalia R. R., dated April 17, 1913, covering joint station building at Borton, Illinois.

29. Contract between C. I. & W. and Springfield Gas & Electric Company, dated June 1, 1913, for wire line crossing at Springfield, Ill.

30. Contract between Wabash R. R. Company and C. I. & W. and C. H. and D. Receiver, dated November 10, 1908, for joint use of station at Hammond, Illinois.

31. Contract between C. I. & W. and Pennsylvania Company, dated October 17, 1905, covering use of tracks at Indianapolis.

32. Contract between City of Indianapolis and P. C. C. & St. L. Rwy. and C. H. & I., dated December 27, 1899, covering subway crossing at Rural Street, Indianapolis, Indiana.

33. Contract between I. D. & W. and Peoria, Decatur & Eastern [fol. 42] Rwy., dated December 19, 1899, and supplemental agreement between Illinois Central Rwy. Successor of Peoria, Decatur & Eastern and C. I. & W. and Receiver of C. H. & D., dated November 6, 1907, covering use of track facilities between Olney and West Liberty, Illinois.

34. Contract between Wabash R. R., C. I. & W. and Receiver of C. H. & D. dated February 1, 1906, for use of main track of the Wabash Company from Boody to Decatur, Illinois.

35. Contract between C. I. & W. and Springfield, Clear Lake & Rochester Interurban Company, dated July 21, 1906, for crossing east of Springfield, Illinois, and supplement thereto, dated July 20, 1908.

36. Contract between C. I. & W. and P. C. C. & St. L., dated August 16, 1906, for crossing at Rushville, Indiana.

37. Contract between City of Indianapolis and C. I. & W., dated January 16, 1907, for construction of bridge over Sherman Ave. in Indianapolis.

38. Contract between C. I. & W. and Ft. Wayne, Cincinnati & Louisville Railroad, dated March 2, 1907, for crossing at Rushville, Indiana.

39. Contract between C. I. & W. and Receivers of C. H. & D., Peoria, Decatur & Eastern Rwy. and Big Four Railroad, dated May 31, 1907, for joint trackage at Indianapolis.

40. Contract between Chicago & Eastern Illinois Railroad and C., I. & W., dated May 15, 1914, covering construction of double track crossing at Tuscola, Illinois.

41. Contract between C., I. & W. and Wabash Sand and Gravel Company and Terre Haute Sand & Gravel Company, dated May 20, 1913, covering operation of gravel pit at Montezuma, Indiana.

42. Contract between C. I. & W. and Indianapolis Union Rwy. Company and P., C., C. & St. L., dated November 9, 1914, covering

overhead crossing of the Indianapolis Union Railway over the tracks of the P., C., C. & St. L. and C., I. & W.

43. Contract dated October 27th, 1906, between C. I. & W. and Central Union Telephone Company for telephone conduit at Indianapolis.

44. Contract dated October 31st, 1881, between Indianapolis, Decatur & Springfield Railway and Indiana, Bloomington & Western Railway for trackage in Indianapolis.

45. Ordina-ce of City of Indianapolis dated June 6th, 1898, incorporating contract between C. H. & D. and Indianapolis Manufac-[fol. 43] turers and Carpenters Union for construction and maintenance of three tracks across New Jersey Street in Indianapolis.

46. Contract dated February 16th, 1906, between C. H. & D., C. I. & W. and C. & E. I. for maintaining and operating crossing and interlocker at Hillsdale, Indiana.

47. Contract dated April 10th, 1906, between Big Four and C. I. & W. for interlocker at Chrisman, Illinois.

48. Contract dated March 2nd, 1907, between Fort Wayne, Indianapolis & Louisville Railroad Co. and C. I. & W. for crossing at Rushville, Indiana.

All contracts made by the C. I. & W. Railway Company or its predecessors in title, covering the construction, maintenance and operation of industrial side-tracks along, upon or appurtenant to the lines of railroad mentioned and described in the foregoing paragraph I of this description of the Mortgaged Property herein directed to be sold.

VIII

The following leases and contracts made by The C. H. & D. Railway Company or its receiver or receivers:

49. Lease of May 8, 1905, from D. T. Roots and wife to The Cincinnati, Hamilton & Dayton Railway Co. for a gravel pin near Connersville and the modification of the same dated November 3, 1911.

50. Contract of July 1, 1912, between The C. H. & D. Ry. Co. and the L. E. & W. R. R. Co. respecting a connection track and use of turn-table at Connersville, Indiana.

51. Contract of May 11, 1905, between the C. C. C. & St. L. Ry. Co., and C. H. & D. Ry. Co. respecting crossing gates at West Washington and Harding Streets, Indianapolis.

52. License of August 1, 1913, from the P. C. C. & St. L. Ry. Co. to the C. H. & D. for the construction of a signal cable on twenty-two poles in Indianapolis.

53. Contract of March 6, 1907, between the Chicago & Eastern Illinois R. R. Co. and The C. H. & D. Ry. Co. respecting crossing gates at Tuscola, Illinois.

54. Lease of May 1, 1912, from the Illinois Central R. R. Co. to The C. H. & D. Ry. Co. for a driveway at Decatur, Ill.

55. Supplement of February 4, 1914, to an agreement of September 25, 1902, between the Chicago & Alton R. R. Co. and the C. I. & W. Ry. Co.

56. Contract of September 7, 1881, between The C. H. & D. Ry. Co. and the New Castle and Rushville R. R. Co. (now L. E. & W.) for crossing at Rushville.

[fol. 44] 57. Contract of February 1, 1911, between The C. H. & D. Ry. Co. and the Wabash R. R. Co. for joint use of passenger station at Decatur, Ill.

58. All contracts made by The Cincinnati, Hamilton & Dayton Railway Company or its receiver or receivers, covering the construction, maintenance and operation of industrial side tracks along, upon or appurtenant to the lines of railroad mentioned and described in the foregoing paragraph I. of this description of the Mortgaged Property herein directed to be sold.

Dated June 29th, 1915.

Howard C. Hollister, United States District Judge.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION ON MOTION TO DISMISS PETITIONS—Filed November 1, 1924

HICKENLOOPER, District Judge:

These causes come on for hearing upon motions to dismiss petitions of the Cincinnati, Indianapolis & Western Railroad Company filed July 2, 1924, on the ground that the court is without jurisdiction to entertain said petitions, and if the court determines that such jurisdiction exists, then for the reasons (1) that such petitions did not disclose facts sufficient to constitute a valid action in equity; (2) that the opportunity of petitioner to exercise its rights, if any, to change the election or to modify the foreclosure decree with respect to the rejection of the contract or contracts now sought to be rejected, was exhausted by the prior proceedings in this court and on appeal; (3) that the alleged mistakes, from the consequences of which petitioner prays relief, are mistakes of law only, and not of fact; (4) that the petitioner has been guilty of laches, depriving

it of the right to relief prayed in the petition, or to any relief [fol. 46] in equity.

The present controversy arises under a situation created by the decree of foreclosure originally entered in the above-entitled causes, and has especial reference to the obligation, if any, of the present petitioner to pay two-thirteenths of the fixed rental of the Indianapolis Union Railway Company, operating the terminal in the city of Indianapolis. This terminal was originally established under the contract of September 20, 1883, whereby five original proprietary companies agreed to an equal division of a fixed rental for the use of the Union Railway facilities by way of interest at 7% upon the appraised valuation of the Union Railway properties and belt line. This agreement provided that such fixed rental should be "from time to time divided into as many equal shares as there are railroad companies using said property, and each company so using the same shall pay one of said shares." There was also an express provision that "no abatement shall be made from the fixed rental so to be paid by each company, by reason of such company not using either the Union Passenger Depot or the Belt Railway." Provision was also made for the admission of other named non-proprietary companies, and eight of such companies were subsequently admitted to use of the terminal facilities.

One of the eight subsequent signators of this agreement was the Indianapolis, Decatur & Springfield Railway Company, operating a line westwardly from Indianapolis; another was the Cincinnati, Hamilton & Indianapolis Railroad Company, operating a line eastwardly from Indianapolis. These companies subsequently consolidated to form the Cincinnati, Indianapolis & Western Railway [fol. 47] Company; and from the time of such consolidation until the filing of the foreclosure suits above mentioned the consolidated company assumed the obligation of, and paid rental under, the two contracts of its constituent companies, or, in other words, paid two-thirteenths of the fixed rentals.

Default having been made in the payment of mortgage indebtedness by the Cincinnati, Indianapolis & Western Railway Company, a suit was brought to foreclose the mortgage of the Cincinnati, Indianapolis & Western Railway upon the entire consolidated properties, and also to foreclose the underlying mortgage of the Indiana, Decatur & Springfield Railway Company upon the portion of the properties lying west of Indianapolis. Decrees of sale were entered in both cases, and in each the property was purchased by a bondholders' committee, by which committee the present petitioner, the Cincinnati, Indianapolis & Western Railroad Company, was subsequently organized. The decree of foreclosure and sale contained a provision that the purchaser and his successors or assigns should have the right, for the period of thirty days after the delivery of deed or instruments of transfer from the special master, to elect whether or not to assume or adopt any lease or contract made by the defendant consolidated company or its predecessors in title, and that such purchaser should be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have

filed a written election not to assume or adopt with the clerk of this court. Within the thirty days so designated the petitioner, the Cincinnati, Indianapolis & Western Railroad Company, filed with the clerk of this court an instrument whereby it was sought to reject the contract theretofore entered into by the Indianapolis, [fol. 48] Decatur & Springfield Railway Company, and to adopt and assume the contract theretofore entered into by the Cincinnati, Hamilton & Indianapolis Railroad Company as to the use of the terminal facilities of the Indianapolis Union Railway Company.

This purported election was made upon the assumption that these two contracts were separate and distinct, and that as purchaser the Cincinnati, Indianapolis & Western Railroad Company had the option to adopt either or both or to reject either or both. Thereupon the Indianapolis Union Railway Company filed a supplemental petition in this court to recover from the present petitioner the original two-thirteenths of the fixed rental, upon the theory that such purchaser must adopt or reject, in toto, the contract privileges and obligations theretofore binding upon its immediate predecessor in title, the Cincinnati, Indianapolis & Western Railway Company. The district court held that the petitioner, as purchaser, could not accept all the benefits theretofore enjoyed by its immediate predecessor in title and relieve itself of one-half of the burdens, by the acceptance of one contract and the rejection of the other. This finding of the district court was thereafter affirmed by the Court of Appeals (279 Fed. 356), such court holding that "the rental contract had become, in effect, but a single contract on the part of the consolidated company" and the foreclosure decree "was not intended to confer the right to accept all the benefits and at the same time reject a portion of the burdens conferred by it." Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit was denied by the Supreme Court on the first day of May, 1922 (258 U. S. 629).

The present petition contains the averment that if the petitioner [fol. 49] had been aware that in making its election to adopt one contract and reject the other, it would thereby become obligated to pay two parts of the fixed rental instead of one, the petitioner would have rejected all obligations under both contracts for the reason that the payment of two parts of the fixed rental was then and is out of all proportion to the use petitioner ever made, now makes, or can make of the Union Railway facilities. The particulars upon which this allegation of an inequitable division of payment and benefits is founded are likewise set forth in detail in the complaint.

From the date of the denial of the petition for writ of certiorari by the Supreme Court, May 1, 1922, until the present time, or certainly until July 2, 1924, the petitioner has continued to use the terminal facilities of the Indianapolis Union Railway Company and to pay the fixed rental established under the prior decisions upon this point.

The first question to be considered upon the motion to dismiss is that of the jurisdiction of this court to entertain the present petition. There is not the requisite diversity of citizenship between

the petitioner and the parties made defendants by such petition, and no federal question or other ground for jurisdiction is shown. If by its action the petitioner is simply seeking to be relieved of the obligations of a contract admittedly entered into by it, upon the ground of mistake and without express reference to the right of election conferred by the decree of foreclosure, the relief sought is so independent of the former proceedings as to be in no sense ancillary or supplemental thereto. If, on the other hand, the question presented involves the construction to be placed upon the at- [fol. 50] tempt of the petitioner to accept one contract and to reject the other, under the foreclosure decree, or if the petition seeks to relieve the petitioner from the full force and effect of the decisions in the prior litigation and to procure such modification of the foreclosure decree as will now enable the petitioner to make that election which it is stated it would have made but for its mistake as to the nature of the election afforded by the foreclosure decree and but for the mistake as to its then existing rights thereunder, we are clearly of the opinion that the present petition is ancillary and supplemental to the original actions, and that the court now has jurisdiction to consider the same.

It is expressly held by the Sixth Circuit Court of Appeals in the prior litigation between parties hereto that:

"A bill in equity dependent upon a former suit in the same court may be maintained by the purchaser under the decree or by any other party interested therein * * * to restrain, avoid, explain, or enforce the judgment or decree therein."

Citing Lang v. Choctaw, etc., Co., 100 Fed. 355. In its decision, in addition to approving the quotation just cited the Court of Appeals says:

"It is the broad general rule that where a bill in equity is necessary to have a construction of an order or decree of a federal court, or to explain, enforce, or correct it, such bill may be filed in and entertained by such court, notwithstanding the parties interested in having such construction made would not, for want of diverse citizenship, be entitled to proceed by original bill of any kind in a federal court."

Ample authority is cited to sustain the rule so announced. And just as a court is unquestionably authorized to entertain a supplemental bill to construe, enforce, and give effect to its decrees and to protect [fol. 51] the acknowledged prior jurisdiction of the court, so also it would seem proper to entertain a bill to avoid an inequitable effect of the acts of the purchaser and to relieve such purchaser from the unintended effect of his act under the decree, where such act was the result of honest mistake upon the purchaser's part. This is especially so where, by the decree, the court reserves for future adjudication all questions not then disposed of and gives to any party to the cause the right to apply to the court for further relief at the foot of the decree.

Such provision would not confer jurisdiction in a case not truly ancillary or supplemental to the original jurisdiction, but is simply declaratory of the right that courts of equity have always exercised to enforce, construe, give effect to, or relieve from the effect of, their own decrees.

What we have said we think disposes of the question of jurisdiction and of the contention of the defendants that the right of the petitioner to change its election or to modify the foreclosure decree, or to be relieved from the effect thereof, was exhausted by the prior proceedings in this court and on appeal.

The next contention to be considered is that the alleged mistakes, from the consequences of which petitioner prays relief, are mistakes of law only, and not of fact, and that they are unilateral and do not therefore offer ground for equitable relief. While it has been generally and loosely stated in a number of federal decisions that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake (Utermehle v. Norment, 197 U. S. [fol. 52] 40, 46); yet the Supreme Court, in the leading case of Hunt v. Rousmaniere's Administrators (1 Pet. 1-16), was careful to say that it was not its intention "to lay it down, that there may not be case in which a court of equity will relieve against a plain mistake, arising from ignorance of the law."

In many cases the courts have gone far in construing mistakes of law as mistakes of fact or as mistakes upon mixed questions of law and fact in order to avoid the general rule. See Barnett v. Kunkle, 256 Fed. 644 (C. C. A. 8); Blakeman v. Blakeman, 39 Conn. 320. Other courts have attempted to draw the distinction between a mistake of law as to one's private or property rights and a mistake as to general law. See Cooper v. Phibbs, L. R. 2 H. L. 149, and the general discussion of the subject in Reggio v. Warren, 207 Mass. 525, 533-4-5; also, A. & V. Ry. Co. v. Jones, 73 Miss. 110. But many courts have fearlessly announced the principle that in a proper case Equity will relieve against mistakes of law as well as mistakes of fact. See Snell v. Insurance Co., 98 U. S. 85, 90, 91; Griswold v. Hazard, 141 U. S. 260, 284; Philippine Sugar Co. v. Philippine Islands, 247 U. S. 385; In re Smith Flynn Commission Co., 292 Fed. 465, 471 (C. C. A. 8).

Our conclusion from a survey of the whole field of cases dealing with the application of the general rule above stated, is that, admitting the existence of such rule, so many exceptions have been engrafted upon it that it may well now be said that a mistake of law, certainly in the sense of a mistake as to the substantive or legal rights of the parties to a contract, is to be placed in the same category as a mistake of fact, and that relief will be granted in any case where [fol. 53] relief would be granted upon the ground of mistake of fact, even where the only additional attending circumstance is that without the granting of such relief an unscionable advantage would be obtained by one of the parties or great hardship suffered by the other.

In practically all of the cases applying the general rule, upon which the defendants rely, the mistake of law was attended with other circumstances, such as estoppel or/and acquiescence (Utermehle v. Norment, 197 U. S. 40), which would defeat the right of recovery without dependence upon the general rule; or the mistake was not made out by such clear and convincing proof as is required (Leyman v. Jones, 222 U. S. 51; Bailey v. Lisle Mfg. Co., 238 Fed. 257, C. C. A. 8); or the jurisdiction of the court of equity was defeated for reasons entirely divorced from the question of whether the mistake was one of law or of fact. Of this last mentioned class we consider most of the cases to set aside the judicial sale of real estate because of mistake upon the part of the purchaser. Either the principle of caveat emptor should apply, or the purchaser was negligent in examination of title, or the parties could not be placed in statu quo, or other reason intervenes to make relief in equity inapplicable. These cases are not so closely analogous to the one at bar as to be helpful.

It is also urged by the defendants that no relief can be granted for the reason that the mistake is unilateral. If the question before the court is to be considered, as presented upon argument, to be whether the petitioner is to be held bound to an election which it never in fact made and never intended to make, and which in fact [fol. 54] it would not have made but for the belief that one contract might be accepted and the other rejected, we are clearly of the opinion that this objection is without merit. The foreclosure decree specifically granted to the petitioner the right of election as to which contract it would assume and which it would reject. This right of election was wholly unilateral. No one was interested in it primarily but the petitioner. If the petitioner, as purchaser, labored under such a mistaken view of its rights as to make it a hardship and injustice, to force upon it an election it never intended to make, the court can, and we think should, relieve as against such election in the absence of subsequent ratification, confirmation, laches or waiver. In the case of Griswold v. Hazard, 141 U. S. 260, the plaintiff was relieved from the literal effect of the langauge of a bond given under writ of ne exeat because at the time of execution he was under the mistaken belief that the bond was "in effect, a bail bond." At page 284 the court says:

"A court of equity ought not to allow that mistake, satisfactorily established and thus caused, to stand uncorrected, and thereby subject a surety to liability he did not intend to assume, and which, according to the decided preponderance of the evidence, there was at the time no purpose to impose upon him."

In this case the mistake was in effect unilateral. So, also, the court relieved against a unilateral mistake in preparing a bid for the construction of a church, in Nicholas Church v. Kropp, 135 Minn. 115. In Goodrich v. Lathrop, 94 Cal. 56, the court relieved against a unilateral mistake in the purchase of certain property, the purchaser having viewed the wrong lot prior to such purchase. In Werner v. Rawson, 89 Ga. 619, the court relieved against a unilateral mistake

[fol. 55] in the amount of the consideration paid and stated in a conveyance. And in Hearne v. Marine Insurance Co., 20 Wall. 488, 491, Mr. Justice Swayne specifically says:

"A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

What is here said is not intended as an expression of a doctrine that in all cases of unilateral mistake of either fact or law a cause of action for rescission in equity exists. But many cases might be cited in which equity has intervened, on the ground of unilateral mistake of fact or law, to prevent the hardship and injustice of forcing upon an innocent party a contract which he never intended to make, although there is no fraud upon the opposing party and the mistake was not due to his acts.

We do not consider the cases upon election of remedy as pertinent to the present inquiry except insofar as they establish the principle that the petitioner was not estopped at the close of its litigation, by its election to litigate the previous issue, to appeal to a court of equity for relief. In other words, the right of a petitioner in equity is not exhausted by his prior election of remedies.

The doctrine here announced to the effect that where the act to be performed is wholly unilateral and in no sense partakes of the nature of a contract upon new and present consideration, and where the active party is free to assume or reject obligations, albeit with attending rights and benefits, equity may relieve from a wholly innocent and unilateral mistake, is well illustrated by the cases cited to the court upon the question of election under wills. See Macknet v. Macknet, 29 N. J. Eq., 54; Watson v. Watson, 128 Mass. 152; [fol. 56] In re McFarlin, 9 Del. Ch. 430; In re Evans' Appeal, 51 Conn. 435. These cases are all peculiarly analogous to the case at bar, in that in them, as here, the petitioner for relief was free to accept or reject the provisions of a written instrument, there a will, here a contract. In both instances no new consideration moved from the other parties in interest, and the position of such other parties was not changed by the election. In both it would seem that if the right was promptly asserted, the petitioner should be relieved from assuming a position which it was never intended should be assumed. If the mistake be not due to the petitioner's negligence, there is such hardship in enforcing an unacceptable obligation and such injustice in penalizing the innocent mistake of a party litigant, as should lead a court of equity to grant relief.

It remains to be considered whether the petitioner is barred by laches from now asserting such a right. In this connection we think that it is necessary to distinguish, at least in the instant case, between laches upon the one hand and wavier or acquiescence upon the other. The defense of laches ordinarily contemplates either such long delay as to inconvenience the parties in the preparation and presentation of their defense, through the loss of evidence and the fallability of the memory of witnesses, or such change in the condition and rela-

tions of the parties during the period of delay that it would be an injustice to the defendant to permit the plaintiff to assert his rights. Properly speaking, mere delay short of the period of limitations is insufficient to constitute laches. There must be something in the nature of estoppel, some change in the position of the adverse party which makes it inequitable to proceed against him. Galliher v. [fol. 57] Cadwell, 145 U. S. 368, 372; Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 696, 697; Utermehle v. Norment, 197, U. S. 41.

Although related and often designated as laches, the doctrine of acquiescence or waiver is dependent upon a somewhat different principle. This principle is well stated in the case of Grymes v. Sanders, 93 U. S. 55, 62. The court there says:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

In Snell v. Insurance Co., 98 U. S. 85, 90, the court says:

"Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake."

In Shappirio v. Goldberg, 192 U. S. 232, 242, the court says:

"It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own, the right of rescission is gone, and the party will be held bound by the contract."

The same doctrine was applied in the cases of Ward v. Sherman, 192 U. S. 168; Patterson v. Hewitt, 195 U. S. 309; Hammond v. Hopkins, 143 U. S. 224; Miller v. Continental Shipbuilding Corporation, 265 Fed. 158, 161 (C. C. A. 2); Schafroth v. Ross, 289 Fed. 703 (C. C. A. 8); Miller v. Rush, 276 Fed. 641, 644 (C. C. A. 5); and, at least in part, Graves v. Boston Marine Insurance Co., 2 Cranch, 419, 444.

If not constituting laches in the technical sense, because of lack of prejudice to the Indianapolis Union Railway Company arising [fol. 58] from the delay, yet the delay of the petitioner for more than two years to assert its right to rescission, after express knowledge that it could not adopt and assume one contract and reject the other, or assert the right it now claims to rescind both contracts, is

highly indicative of the then intention upon its part to make the best of a bad election and retain the use of the terminal facilities upon the payment of two-thirteenths of the fixed rental. While it is averred in the bill that the petitioner's election to be bound by one contract and to be relieved of the obligations of the other, was made under a mistaken belief that there were two contracts and that either might be assumed or rejected without relation to the other, and while we are of the opinion that if promptly asserted the petitioner would have been entitled to relief, the delay in asserting its rights is in no way explained. The misapprehension under which it labored was fully disclosed to the petitioner more than two years ago. It was then that the petitioner was called upon to act. The period given by the foreclosure decree for election to assume or reject contracts was short and definitely limited. This was for the purpose of an early determination of the relationship of the parties and for purposes of repose as to contract relations. When the petitioner became advised of its mistake it would not necessarily have had to begin its proceedings within the period of thirty days, the time originally allowed for election, but it was bound to promptly "announce its purpose and adhere to it". In its mere inaction and silence the case is analogous, in the contract relation created, to the acceptance of a deed containing restrictive covenants. By the [fol. 59] acceptance of the deed and the retention of the property the binding effect of the covenant comes into existence, although the sole so-called covenantor is not a signator of the deed. When, after being fully advised of its rights, the petitioner continued to use the terminal facilities and to treat the obligation to pay two-thirteenths of the fixed rental as binding upon it, and to treat the contract as existing, for a period of two years, it in effect made a new election, and either waived any rights which might have then existed by reason of the initial mistake, or so acquiesced in the situation in which it found itself as to preclude relief upon the grounds now urged. The situation has changed from one in which the petitioner is asking to be relieved from the effect of an election which it never intended to make, to one in which the petitioner can only ask to be relieved of an election intentionally made under misapprehension as to its rights.

This situation, thus presented, has direct bearing upon the question of jurisdiction. If, abandoning reliance upon the original mistake set up in the bill, the petitioner alleges that its subsequent election was made in ignorance of its right to appeal to a court of equity for relief as from the original election, the petitioner is confronted with the fact that the granting of the relief prayed for in no way involves a construction of the original foreclosure decree nor the construction to be given to any act thereunder. It could only be urged that a right of rescission existed because of facts independent of the foreclosure decree and constituting merely the conditions under which the election was voluntarily exercised. The determination of this question would be separate and distinct from all questions originally before the court and not ancillary or

[fol. 60] *or* supplementary thereto. In such case the court would not, in our opinion, as heretofore announced, have jurisdiction. It is unnecessary, therefore, to determine whether such mistake, if ignorance of the general law can be called a mistake, would entitle the petitioner to relief in an independent action. It is sufficient to say that upon such allegations this court would not have ancillary or supplementary jurisdiction. The election given under the foreclosure decree having been voluntarily exercised in favor of the assumption of the contracts, with full knowledge that one could not be assumed and the other avoided, all questions of the rescission of that election are separate and distinct from the actions here pending. The affirmative action under the election granted by the foreclosure decree has exhausted the subject-matter in this proceeding. We are no longer concerned with the motives which impelled the petitioner to the action taken, although these might be made the subject of independent inquiry.

For the reasons stated, we are constrained to the opinion that the petitioner is not entitled to relief in these actions upon the ground of the mistake alleged nor, if the petitions were amended so as to aver the mistake immediately subsequent to May, 1922, the ignorance of the existence of a right to then prosecute such action, could the court entertain such bill as supplementary and ancillary to these cases, for want of jurisdiction.

The present petitions must therefore be dismissed for want of equity.

November 1st, 1924.

(Signed) Smith Hickenlooper, District Judge.

[fol. 61] For the Petitioner: Murray Seasongood, F. J. Goebel, Lester Jaffe.

For the Defendants: Maxwell & Ramsey, L. J. Hackney, Baker & Daniels.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF THE CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY FOR LEAVE TO AMEND PETITION—Filed Nov. 13, 1924

Petitioner, The Cincinnati, Indianapolis & Western Railroad Company, moves the court for leave to amend its petition filed herein on July 2, 1924, by filing the amendment submitted herewith, marked "Exhibit A," on the ground that petitioner wishes its petition to show affirmatively that it did not acquiesce in the final decision requiring it to pay two-thirteenths (2/13ths) of the rental or waive its right to relief.

Murray Seasongood, F. J. Goebel, Lester A. Jaffe, Attorneys for Petitioner.

[fol. 63] IN UNITED STATES DISTRICT COURT.

[Title omitted]

MEMORANDUM IN SUPPORT OF MOTION TO AMEND PETITION—Filed Nov. 13, 1924

Federal Equity Rules 28 and 29 allow amendment by permission of the court after pleading filed by the defendant.

The memorandum opinion filed on motion to dismiss petitions concludes that the petition must be dismissed solely because of unexplained delay in seeking relief. The amendment submitted explains this and takes the amended petition out of the scope of the cases cited in the court's opinion.

Murray Seasongood, F. J. Goebel, Lester A. Jaffe, Attorneys for Petitioner.

[fol. 64] IN UNITED STATES DISTRICT COURT.

[Title omitted]

ORDER AMENDING PETITION—Filed Dec. 2, 1924

Come again the parties, by their respective counsel, and the motion of Cincinnati, Indianapolis & Western Railroad Company, (filed November 13, 1924) for leave to amend its petition (filed July 2, 1924) is submitted to the Court; and the Court, being duly advised in the premises, now orders that the petition of the C. I. & W. Railroad Company, filed July 2, 1924, be and it is amended by the insertion therein, immediately preceding the prayer of said petition, of the allegations contained in Exhibit A, attached to said motion filed November 13, 1924. Entered nunc pro tunc as of November 29, 1924.

(Signed) Smith Hickenlooper, U. S. District Judge.

O. K. M. Seasongood, F. J. Goebel, for Petitioner; Baker & Daniels, Maxwell & Ramsey, L. J. Hackney, Attys. for Defendant.

[fol. 65] IN UNITED STATES DISTRICT COURT.

[Title omitted]

AMENDMENT TO PETITION—Filed Jan. 20, 1925

Petitioner, The Cincinnati, Indianapolis & Western Railroad Company, by leave of court first had, files this, its amendment to the petition filed herein on the second day of July, 1924, by inserting therein immediaterly preceding the prayer of the petition, the following:

Shortly after the denial of the petition for writ of certiorari by the

Supreme Court of the United States, your petitioner called to the attention of The Indianapolis Union Railway Company the amount of the over-payment based on use for the period January 1, 1916, to May 31, 1922, inclusive, with your petitioner paying two-thirteenths (2/13ths) rental, and showed that in the case of your petitioner such over-payment amounted to $295,759 in said period and requested that it be relieved of such unjust over-payment in the future.

Petitioner never intended to acquiesce and did not acquiesce in the decision requiring it to pay two-thirteenths (2/13ths) of the rental contrary to its expressed intention not to do so by the written [fol. 66] election filed herein, and petitioner attempted in various other ways, for a reasonable time, to be relieved of such obligation without recourse to law. By way of example, petitioner called attention in January, 1923, to the fact that it was the only tenant line paying more than one unit and the manifest injustice thereof and petitioner at that time had reason to believe that relief could be obtained without recourse to law.

In September, 1923, the then president of your petitioner, who has made the aforesaid remonstrances and efforts to be relieved from the unjust burden of said contract, became ill and resigned and a new president was not appionted until December 1, 1923.

When petitioner ascertained that it could get no relief without resort to court action it expressly made all payments under protest and began preparation for relief through the courts.

Your petitioner further says that none of the defendants herein, nor any other company, has been in any way prejudiced by the interval of time which has elapsed between the denial of the petition for writ of certiorari and the filing of the petition herein, but, on the contrary, avers that all of said defendants had knowledge that your petitioner did not intend to acquiesce in the decision requiring it to pay two-thirteenths (2/13ths) of the rental and said defendants have, during the period referred to, benefited by petitioner having paid rental in excess of what it would have paid had it sought relief by court action immediately.

Murray Seasongood, F. J. Goebel, L. A. Jaffe, Attorneys for Petitioner.

[fol. 67] IN UNITED STATES DISTRICT COURT.

[Title omitted]

JOINT AND SEVERAL MOTION OF THE INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, AND THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, TO DISMISS THE PETITION AS AMENDED, OF THE CINCINNATI, INDIANAPOLIS AND WESTERN RAIROAD COMPANY—Filed Dec. 2, 1924

The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburg,

Cincinnati, Chicago and St. Louis Railway Company, hereby move the Court to dismiss the petition of The Cincinnati, Indianapolis & Western Railroad Company, as amended by the amendment filed by said Cincinnati, Indianapolis & Western Railroad Company on the 29th day of November, 1924, on the ground that it appears upon the face of said petition as amended, that the Court is without jurisdiction to entertain the same, because the petition as amended presents no federal question, and diversity of citizenship requisite to jurisdiction does not appear upon the face of the petition as amended, which, although purporting to be a proceeding in the cause as above entitled, is in fact an independent suit de novo.

In the event that the foregoing motion should be overruled, these [fol. 68] moving parties jointly and severally, without waiving their objection to the jurisdiction as above set forth, but relying on the same, and in the alternative only, move the Court to dismiss said petition as amended, on the grounds that it appears on the face thereof:

(1) That there is an insufficiency of facts to constitute a valid cause of action in equity;

(2) That the opportunity of petitioner to exercise its rights, if any, to change the election or to modify the foreclosure decree with respect to the rejection of the contract or contracts now sought to be rejected, was exhausted by the prior proceedings in this Court and on appeal;

(3) That the alleged mistakes, from the consequences of which petitioner prays relief, are mistakes of law only, and not of fact;

(4) That the petitioner has been guilty of laches, depriving it of the right to relief prayed in the petition as amended, or to any relief in equity.

Baker & Daniels, Maxwell & Ramsey, L. J. Hackney, Solicitors for the Indianapolis Union Railway Co., the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Co.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION SUPPLEMENTAL TO OPINION RENDERED NOVEMBER 1, 1924—Filed Jan. 20, 1925

HICKENLOOPER, District Judge:

Subsequent to the decision of this court filed November 1, 1924, counsel for the C. I. & W. Railroad Company filed motions for leave to amend the petitions heretofore filed herein on July 2, 1924, and the question coming on for hearing upon such motions, the

argument developed into an inquiry whether the petitions of the railroad company as sought to be amended would avoid the effect of the previous opinion of the court. The court accordingly announced that the amendments to the petitions might be filed, and by agreement of counsel the matter was submitted as if upon motion to dismiss the petitions as amended.

The amendments in substance specifically traverse any intention to acquiesce in the situation existing at the termination of the prior litigation or to affirmatively elect to continue a contract to pay two-thirteenths of the fixed rental rather than to reject the contract in [fol. 70] its entirety, and aver the making of protests and the assertion of a right to be relieved from alleged unjust overpayment in the future. These protests and assertions of right to be relieved of such obligation were made to the Indianapolis Union Railway Company, it is averred, in an effort to avoid litigation and to adjust the claim now urged. The petitions do not aver, and we cannot assume the fact to be, that at any time did the petitioner assert any right, now asserted, to be relieved of all contractual obligations with the Indianapolis Union Railway Company or to surrender the benefits of such contracts or to cease the use of the terminal facilities afforded thereunder. From all that appears, the purpose of the petitioner was to retain the use of the terminal facilities but to secure a reduction of the rental to be paid from two-thirteenths of the fixed rental to one-twelfth thereof.

While the court, in its previous opinion, treated the question as if the petitioner were vested with the power of election to accept or reject the contracts in question, it is to be noted that this was perhaps an unhappy method of expressing petitioner's rights. The rights of the mortgagor companies under these contracts were purchased with the mortgaged properties. The election conferred was to reject or elect not to be bound by such contracts, and this within a definitely prescribed time. In the event of total inaction for the prescribed period of thirty days, the petitioner would have been as fully and completely bound by the contract provisions as it would have been had it affirmatively elected to be so contractually bound. When, therefore, the petitioner was advised that its attempt to [fol. 71] reject the contract of one of its predecessors in title was wholly ineffective and the mistake of law under which the petitioner labored was fully disclosed, the instant duty of announcing its purpose to reject both contracts and of adhering to the purpose so announced, was emphasized. It is clearly insufficient that the petitioner should then have sought to be relieved of the obligation to pay the entire two-thirteenths of the rental while continuing the enjoyment of the terminal facilities, or that the petitioner should then have endeavored to procure the substitution of a new contract for the old upon terms which it considered more just and equitable.

With this situation in mind, does the petitioner's allegation that at no time did it intend to waive the right to be released from, or acquiesce in the payment of, two-thirteenths of the fixed rental alter the situation in any way? Or that the defendant was in no

way prejudiced by the delay? We think not. The petitioner first urged upon the court that it was asking to be relieved of the election to reject one contract while retaining the benefit of the other, because of the mistake of law under which it labored, viz: that this could be done. It sought, it was contended, to be relieved of an election it never intended to make and to make now that election which it would then have made but for this mistake. If promptly asserted, the court has announced the opinion that such relief should have been granted. A petition to achieve that result would have been truly ancillary to the foreclosure proceeding. There would have been no estoppel by election of remedy nor otherwise. But the petitioner was duly advised of that mistake in 1922, and if we are correct in our previous holding that an affirmative [fol. 72] duty was then imposed upon the petitioner to promptly reject both contracts or be bound by them,—to assert the one election granted by the decree then or not at all,—the mistake so originally alleged and urged upon the court must be abandoned altogether as a ground for relief. A renewed contract relation came into existence through the purchase at foreclosure in 1915 and the inaction of the petitioner in 1922. The only right given by the decree was to reject within the short period allowed. The petitioner was advised in 1922 that it must reject both contracts or neither. It saw fit not to reject both. It therefore became bound by both, and the only mistake which it could possibly now urge was that in May, 1922, counsel did not inform it that both contracts could still be rejected, that they were mistaken as to their legal rights in this particular and at that time.

This suggests the dual character of the question presented to the court, the first aspect being that of the effect of the delay from 1922 to 1924, and the second aspect raising the question whether such ignorance of or mistake as to the petitioner's rights in 1922 results in making the present proceedings ancillary to the foreclosure decree.

As to the first question, it is earnestly insisted that if the right to reject both contracts existed in 1922, and could then have been asserted by action ancillary to the foreclosure action, such right could only be lost by application of the doctrine of waiver or acquiescence, that the court has so held the right to have been lost, and that in so doing the court failed to appreciate the effect of those authorities which establish the doctrine that waiver or acquiescence will never be assumed in the absence of prejudice to the adversary [fol. 73] party for such action upon the part of the petitioner as is wholly inconsistent with the assertion of the right or estops the petitioner from thereafter asserting such right. In urging this contention we think that counsel for the petitioner has misconceived the position of the court and loses sight of the true nature of the right of the petitioner in 1922. The question presented is not one of waiver or acquiescence in the sense in which these terms are used in the cases cited, that of estoppel. Waiver or acquiescence in that sense implies the existence of a right to relief but for the prejudice which the petitioner's action (delay) has or would thereby occas-

sion its adversary. The real question here is whether a contr entered into by reason of the acts of the parties and pursuant to t foreclosure decree, shall be set aside because at a time two years a the petitioner had a right then to rescind or reject it but was ignora of such right. Since we still adhere to the position taken that duty was then imposed upon the petitioner to promptly assert position and adhere to it, time was of the essence of the rig Promptness in declaring rejection of the contracts was a conditi precedent to the very existence of the right of rejection. T right is not now unenforceable by reason of any waiver or acqu escence in the sense of estoppel, but the right to reject has ceas to exist by reason of breach of the condition precedent that it promptly asserted. The right given was not of election in t sense of the necessity of definite action either to accept or reje but was really an option to reject, which option has expired.

Our view of the relationship of the parties likewise has distin hearing, we have said, upon the other aspect of the question, tha [fol. 74] of ancillary jurisdiction. The only mistake of law whic in our opinion could have made the present proceedings ancillary t the former ones was the mistaken belief of the petitioner that th contract of one of its predecessors in title might be rejected and th contract of the other predecessor in title accepted. This mistak became inoperative and ineffective in 1922 when the petitioner wa fully advised of it, and we are of the opinion that the new mistak under which the petitioner then labored was so independent of o so remote from the operation of the decree in foreclosure that th one cannot be said to raise a question in any way ancillary to the other. If cognizable by a court of equity at all it is cognizable only by such court having jurisdiction over the parties and under its general equity powers. It involves no question of construction, interpretation, modification or enforcement of the foreclosure decree. It is a controversy existing between the parties founded upon a contract as definitely and distinctly entered into as if it had been made by document altogether independent of the foreclosure. It is not to be considered as ancillary to the foreclosure suit.

Therefore, passing the question as to whether this ignorance of its rights under the general law is such a mistake as will warrant relief in equity, and passing the fact that the petitioner is apparently not relying upon this subsequent mistake or ignorance of the law in 1922, it is clear, to the court at least, that this court has not jurisdiction of the present controversy as ancillary to the original actions and proceedings herein. This is decisive of the right of the petitioner to maintain its present petition, and the court has not decided nor intended to decide whether, in a suit in a court of [fol. 75] general equity jurisdiction, having jurisdiction of the parties and the subject matter, the contract which we have recognized as now existing might be rescinded upon the ground of ignorance or mistake as to petitioner's rights in 1922. Insofar as the previous opinion may have seemed to indicate that such rescission would not be granted, such previous opinion should therefore be modified. We are not at all prepared to so hold. If such independ-

ent action were brought, waiver, acquiescence or laches, not having prejudiced the defendant, would presumably not bar consideration of the equities. But this is a very different question from the one here considered, namely, whether a failure to act promptly when the duty for such action was clearly imposed upon petitioner gives rise to a cause of action which is ancillary to our former proceedings herein. Insofar as the previous opinion or orders dismiss the petition for want of equity the same should be modified, and the amended petition must be dismissed for want of jurisdiction.

January 20, 1925.

(Signed) Smith Hickenlooper, District Judge.

For Petitioner: Murray Seasongood, F. J. Goebel, Lester Jaffe.
For Defendants: Maxwell & Ramsey, L. J. Hackney, Baker & Daniels.

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed Feb. 7, 1925

This cause came on to be heard upon the joint and several motion of the defendants, The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, to dismiss the petition of The Cincinnati, Indianapolis & Western Railroad Company (filed herein July 2, 1924) as amended under the entry herein of December 3, 1924, nunc pro tunc as of November 29, 1924, and was argued by counsel. And the court, being duly advised in the premises, finds that the petition of The Cincinnati, Indianapolis & Western Railroad Company, as amended, is not ancillary, but is original, and that as an original bill this court is without jurisdiction to entertain the same, because no federal question is presented therein, and because the requisite diversity of citizenship does not exist.

It is therefore, ordered, adjudged and decreed that the joint and several motion of the above named defendants be and the same is hereby granted, and that the petition of The Cincinnati, Indianapolis & Western Railroad Company, as amended, be and the same hereby is dismissed at the cost of said petitioner for the sole reason and ground hereinabove specified. To all of which petitioner, The Cincinnati, Indianapolis & Western Railroad Company, duly and in open court excepts and gives notice of appeal.

Enter.

(Signed) Hickenlooper, J.

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Feb. 18, 1925

The Cincinnati, Indianapolis & Western Railroad Company, conceiving itself aggrieved by the decree rendered and entered in the above entitled cause on February 7, 1925, dismissing its petition, as amended, for want of jurisdiction, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Error filed herewith, and prays that its appeal may be allowed, that citation be issued and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States, and petitioner shows that it is entitled to this appeal under Section 238 of the act of Congress of March 3, 1911, as amended, known as the Judicial Code.

Your petitioner further prays that a proper order be made relating to the security to be required of it.

Murray Seasongood, F. J. Goebel, Cadwalader, Wickersham & Taft, Solicitors for the Cincinnati, Indianapolis & Western Railroad Company, Intervening Petitioner.

It is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore rendered and entered herein [fol. 78] be and the same is hereby allowed, and that a certified transcript of the record proceedings and papers upon which said decree was made be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the penalty of the appeal bond be fixed at Two Hundred ($200.) Dollars.

And it is further ordered that the citation on appeal to be issued herein be served on the following parties only or in their attorneys, to-wit: The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company.

Dated at Cincinnati, Ohio, this 18th day of February, 1925.

(Signed) Smith Hickenlooper, Judge of District Court of the United States, Southern District of Ohio, Western Division.

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGMENT OF ERROR

In connection with its petition for an appeal from the decree entered on the 7th day of February, 1925, The Cincinnati, Indianapolis & Western Railroad Company files the following assignment

of error, assigning as error that the District Court erred in dismissing the petition of The Cincinnati, Indianapolis & Western Railroad Company, as amended, for want of jurisdiction.

Murray Seasongood, F. J. Goebel, Cadwalader, Wickersham & Taft, Solicitors for the Cincinnati, Indianapolis & Western Railroad Company.

[fols. 80 & 81] Bond on Appeal for $200—Filed February 18, 1925; omitted in printing

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[fol. 82] Citation—In usual form showing service on Maxwell & Ramsey; filed February 25, 1925; omitted in printing

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[fol. 83] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed Feb. 18, 1925

It is hereby requested that the following portions of the record and proceedings shall be transmitted as the record on appeal in this cause.

(1) Motion of The Cincinnati, Indianapolis & Western Railroad Company for leave to file petition and serve notice thereof.

(2) Order allowing petition of The Cincinnati, Indianapolis & Western Railroad Company to be filed and served.

(3) Petition of The Cincinnati, Indianapolis & Western Railroad Company filed July 2, 1924, and subpœna and returns thereof.

(4) Joint and several motion of The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company to dismiss petition.

(5) Decree for the foreclosure of the First and Refunding Mortgage of the Cincinnati, Indianapolis & Western Railway Company, entered June 29, 1915. (Omitting description of mortgaged real estate property foreclosed.)

(6) Memorandum opinion of Judge Hickenlooper on motion to dismiss petition, rendered November 1, 1924.

(7) Motion of The Cincinnati, Indianapolis & Western Railroad Company for leave to amend petition, filed November 13, 1924.

[fol. 84] (8) Order amending petition of The Cincinniati, Indianapolis & Western Railroad Company, entered nunc pro tunc as of November 29, 1924.

(9) Amendment to petition.

(10) Joint and several motion of The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Rail-

way Company, and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company to dismiss the petition, as amended.

(11) Supplemental memorandum of opinion of Judge Hickenlooper rendered January 20, 1925.

(12) Decree dismissing petition of The Cincinnati, Indianapolis & Western Railroad Company, as amended, for want of jurisdiction.

(13) Petition for appeal and allowance of same.

(14) Assignment of Error.

(15) Bond on appeal.

(16) Citation and acknowledgment of service.

(17) Præcipe.

(18) Certificate of Question of jurisdiction.

(19) Certificate of Clerk.

Signed at Cincinnati, Ohio, this 18th day of February, 1925.

The Cincinnati, Indianapolis & Western Railroad Company, by Murray Seasongood, F. J. Goebel, Cadwalader, Wickersham & Taft, Its Solicitors.

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGE'S CERTIFICATE OF QUESTION OF JURISDICTION—Filed Feb. 18, 1925

The District Court of the United States for the Southern District of Ohio, Western Division, hereby certifies to the Supreme Court of the United States that on the 7th day of February, 1925, a decree was entered in the above-entitled action pursuant to the supplemental memorandum opinion of said court, sustaining the joint and several motion of the defendants, The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company to dismiss the petition, as amended, of petitioner, the Cincinnati, Indianapolis & Western Railroad Company, and dismissing said petition, as amended, on the sole ground that it appears on the face thereof that said petition, as amended, does not show the existence of the requisite diversity of citizenship nor the existence of a Federal question; and that this court, not having found the said petition to be ancillary to any prior suit, but having found the said petition to be original, did thereupon dismiss the same upon the sole ground of want of jurisdiction, as more fully appears from the opinion and supplemental opinion of this court filed herein, which opinion and supplemental opinion are hereby directed to be certified and transmitted to the Supreme Court of the United States as part of the record herein.

[fol. 85a] All of which is hereby certified unto the Supreme Court of the United States conformably to Section 238 of the Act of Congress of March 3, 1911, as amended, known as the Judicial Code.

This court further certifies that this certificate is granted at the term in which the final decree in this cause was entered.

(Signed) Smith Hickenlooper, Judge of the District Court of the United States for the Southern District of Ohio, Western Division.

[fol. 86] IN UNITED STATES DISTRICT COURT

EXHIBIT IN EVIDENCE

PETITION—Filed October 24, 1916

To the Honorable the Judge of said District for the Southern District of Ohio:

By this their petition in the above entitled suit, the Indianapolis Union Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and the Vandalia Railroad Company, respectfully show:

That sometime in the year 1852, the several railroad companies, owning railroads which entered the City of Indianapolis, Indiana, entered into an agreement for the erection and maintenance of a union passenger depot and the building and maintenance of union railroad tracks leading to and from such union passenger depot; the plans for such work were carried out and the union passenger [fol. 87] depot and tracks were built. The real estate necessary for right of way and depot purposes, was purchased by the said several railroad companies and the title to the different tracks was conveyed to one or the other of the several railroad companies; that among such companies was the Peru & Indianapolis Railroad Company; in the year 1859 the said last named company desired to withdraw in part from such union depot and tracks agreement and its request was acceded to by the other railroad companies in such manner that the Peru & Indianapolis Railroad Company agreed to transfer to such corporation as the other companies should designate, the title of the real estate so held by it for the common use of the several railroad companies but that it should continue to use the union depot and tracks and pay annually for such use the sum of twenty-two hundred ($2,200.00) dollars and that this amount should be proportionally increased or decreased as the amounts paid respectively by the several other railroad companies interested in said Union depot and tracks should be increased or decreased, and such new agreement was acted upon by the several railroad companies interested in the Union depot and tracks. From time to time other railroad companies were subsequently admitted to the use of the said Union depot and tracks.

In the year of 1872, the several railroad companies concerned in the Union depot and tracks brought about the incorporation of the Indianapolis Union Railway Company in conformity with an Act of the General Assembly of the state of Indiana, entitled "Gen-

eral Provisions in Relation to Railroad Companies," approved June 15, 1852, and thenceforward continuously down to the present time, the Indianapolis Union Railway Company has been and now is a corporation organized and existing under the laws of Indiana, and has conducted and operated, and is now conducting and operating Union railway tracks and a Union passenger depot in the city of Indianapolis, Indiana, and said property has been used and is now being used by each of the several railroads that have, from time to time, entered the city of Indianapolis, Indiana, with their railroads and have continued to own their railroads down to the present time and by their respective successors in title as to such railroads.

That prior to October 17, 1882, there had been incorporated in the state of Indiana, a railroad company, which on October 17, 1882 was named the Belt Railroad & Stock Yards Company, and said last named company had theretofore built and was operating a line of railroad extending from the then town of Brightwood, a short distance northeast of Indianapolis, southward, southwestward, [fol. 88] westward, northwestward and northward to the then town of North Indianapolis, being a belt railroad about the city of Indianapolis, Indiana, on all sides thereof except the north side.

That on the 17th day of October, 1882, a certain indenture of lease of said belt railroad was executed by the Belt Railroad & Stock Yards Company to the Indianapolis Union Railway Company and upon delivery of said instrument of lease, the Indianapolis Union Railway Company went into possession of said belt railroad as last above described; that thereafter a line of belt railroad was built and constructed westward from said town of Brightwood to a connection with the tracks of the Indianapolis, Peru & Chicago Railway Company and to a point north of the city of Indianapolis, and on the first day of May, 1884, the Belt Railroad & Stock Yards Company executed and delivered an instrument of lease of said last described railroad to the Indianapolis Union Railway Company and immediately upon delivery of said lease, the Indianapolis Union Railway Company entered into possession of said last above described railroad. That the lease first above mentioned was and is for the term of nine hundred ninety-nine years from the first day of October, 1882, and the lease last above mentioned was and is for a term of nine hundred and ninety-seven (997) years from the first day of May, 1884. That each of said leases has remained in full force and effect continuously forward from the date of their respective executions, and the Indianapolis Union Railway Company, from the date of its entry into possession of said belt railway as hereinbefore described, has continued in such possession and has maintained and operated said belt railroad as a part of its Union railway system in an- about the city of Indianapolis and is still in such possession of and is still so operating said belt railroad.

That on or about the 20th day of September, 1883, the several railway companies, successors in title of the several railroad companies which has been the original incorporators of the Indianapolis Union Railway Company made and executed their certain agreement in writing, which was and is as follows:

This Agreement made this twentieth day of September, in the year eighteen hundred and eighty-three, between the Chicago, St. Louis and Pittsburgh Railroad Company, the Jeffersonville, Madison and Indianapolis Railroad Company, the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, the Terre Haute and Indianapolis Railroad Company, and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company.

[fol. 89] Bears witness:

Whereas, The several companies above named constitute what is known as the Indianapolis Union Railway Company, and are the owners of certain properties in the City of Indianapolis, which properties, though belonging in severalty to said several companies, have for many years been designated and used as the property of said Indianapolis Union Railway Company. And,

Whereas, The business of the various railroad lines centering in Indianapolis demands more extensive and better regulated depot and transfer facilities in that city than are now afforded. Therefore, in order to secure this result, the several proprietary companies above named hereby covenant and agreed with each other as follows:

First. Said companies will each, without delay, through proper action of their several boards of directors, convey to the Indianapolis Union Railway Company, so much of their respective properties in Indianapolis as has heretofore been known and used as Indianapolis Union Railway Company property. The form of conveyances, for the sake of uniformity, to be prescribed by the counsel of the Indianapolis Union Railway Company.

Second. Said companies will, through the instrumentality of their present Union Railway Company organization, acquire by purchase or condemnation, such additional land as may be necessary to afford proper union depot facilities in Indianapolis.

Third. Said Union Railway Company shall procure plans for and construct a new union passenger depot, at or near the site of the present union depot in Indianapolis, and construct such additional tracks and appurtenances as may be necessary to secure first-class passenger facilities in said city. The plans for said buildings, tracks and appurtenances, as well as for any modification of the present system of tracks to be first approved by all the directors of the present board of the Union Railway Company.

Fourth. It is hereby agreed that the additional land to be acquired as aforesaid, as well as all tracks, buildings and appurtenances that may be constructed or added to the present property of the Union Railway Company, shall in like manner, as said present property, be deemed to be the property of the Indianapolis Union Railway Company.

Fifth. There shall be forthwith an appraisement made of the value of all the property owned by the Union Railway Company. Also, of the value of the lease for nine hundred and ninety-nine (999) years, lately made by the Indianapolis Belt Railway Company to [fol. 90] the Union Railway Company, and of all additions or better-

ments to said Belt Railway which may have been made since the date of said lease. Also, of all engines, cars and other equipment, tools or machinery used in operating or maintaining said Belt Railway.

Sixth. The appraisement here provided for shall be made by three competent and disinterested railroad experts, provided the chief engineers of the several proprietary companies and of such other companies as may, under the provisions of this agreement, be admitted to said union passenger depot, can not agree upon said value—one of said appraisers to be chosen by the Union Railway Company board of directors; the other to be chosen by the several companies, not proprietary, now using, or purposing to use said new union passenger depot and facilities; and the two thus chosen shall select a third. The appraisement which shall be made either by the chief engineers or by the appraisers to be chosen as aforesaid, shall be conclusive upon all parties, and shall for all time to come constitute the basis on which fixed rental shall be computed and paid, as hereinafter provided.

Seventh. Interest at the rate of seven per centum per annum shall be computed on the appraised value of all the property above mentioned of the Union Railway Company, also, of said Belt Railway lease and betterments, and the amount thereof shall constitute the fixed rental to be paid annually to the Union Railway Company by the several railroad companies making use of the same. Said fixed rental shall be from time to time divided into as many equal shares as there are railroad companies using said property, and each company so using the same shall pay one of said shares. No abatement shall be made from the fixed rental so to be paid by each company, by reason of such company not using either the union passenger depot or the Belt Railway.

Eighth. The tracks of the Union Railway Company shall be used exclusively, as far as possible, for passenger train service and such local freight deliveries as may be necessary in consequence of location of freight houses and private sidings; all other freight transfers and deliveries shall be made over the Belt Railway. A separate account shall be kept of the use, for purposes aforesaid, of the tracks of the Union Railway Company and of the Belt Railway; also, of all expenses connected with each system, growing out of the maintenance, operation, renewal and replacement of the same, including taxes, assessments, insurance, wages and salaries, and moneys paid for damage to persons or property; and such expense shall [fol. 91] be paid by the several companies using each system, in proportion to such use, on the basis of wheelage. In computing such expense, a proper division shall be made of the wages and salaries of employes and officers whose services shall be rendered in connection with both systems.

The fixed annual rental, provided for in Article seventh, and the wheelage proportion of expenses, provided for in this article, shall be payable in lawful money of the United States of America, to the

Treasurer of said Union Railway Company, on or before the last day of each month following the month for which statements showing the amount due from each company as aforesaid shall be rendered by the proper officer of said Union Railway Company.

Ninth. Nothing herein contained shall import a liability upon either of the proprietary companies to make any additions or improvements to said Belt Railway or Union Railway Company property, save with the voluntary consent of such company. Subject to the foregoing provision, the Union Railway Company Board of Directors may from time to time provide additions and betterments which, in the opinion of the Board of Managers, hereinafter provided for, may be necessary to enable the business of the companies using the joint property to be properly accommodated. And the cost of such additions and betterments shall be added to the appraised value provided for in Article fifth hereof, and seven per cent interest thereon shall be computed and paid in the same manner as the fixed rental hereinbefore provided for.

Tenth. In case of a partial or total destruction by fire or other causes of the property of the Union Railway Company, or of said Belt Railway Company, the same shall be rebuilt or replaced under the direction of said Union Railway Company; but the cost thereof shall be borne by the parties using the same, on the basis of wheelage, computed during the period of one year next preceding the destruction of the same, as hereinbefore provided for current expenses of maintenance and operation.

Eleventh. Each company using said union depot property, or said Belt Railway, shall be responsible for loss to person or property, except property used in common, which may arise out of the conduct or neglect of its own employes; claims for loss or damage to person or property, including property used in common, arising out of the conduct or neglect of employes paid in common, shall be paid by the Union Railway Company, and all moneys so paid by it shall be charged to the current account of expenses of operating and [fol. 92] maintaining said Belt Railway or said Union Railway property, as the case may be, and paid as provided in Article eighth.

Twelfth. Subject to the rights of the proprietary companies as heretofore defined, the current operation, maintenance, renewal and repair of said Belt Railway and said Union Railway Company property shall be conducted by a Board of Managers to be composed of one representative from each company using said Union Railway Company property, and under such rules and by such officers and employes as said Board shall prescribe. The President of said Union Railway Company shall be ex-officio chairman of said Board of Managers. Said Board of Managers is hereby vested with authority to make rules governing all joint employes, and prescribe the terms and conditions upon which said Belt Railway and said Union Railway Company property may be used in common; also to appoint all officers, agents and employes who may be necessary to conduct the joint business. But no person shall be kept in the

service of said Union Railway Company who is, for cause shown, unsatisfactory to any company using said depot. They shall also fix the time of the arrival and departure and regulate the movement of all trains upon said Union Railway Company property and said Belt Railway. Each company shall receive equal and impartial privileges in the use of said joint property. All financial transactions incident to the maintenance, operation, renewal and replacement of said property shall be conducted wholly through the officers and agents of the Union Railway Company.

Thirteenth. In addition to the proprietary companies herein mentioned, the following named railroad companies shall, upon their several applications, and upon signing and sealing a copy of this agreement, certified by the secretary of Union Railway Company, be admitted to the joint use of the said Belt Railway and Union Railway Company property:

Wabash, St. Louis and Pacific Railway Company.
Indianapolis, Decatur and Springfield Railway Company.
Indiana, Bloomington and Western Railway Company.
Indianapolis and St. Louis Railway Company.
Indianapolis and Vincennes Railroad Company.
Cincinnati, Hamilton and Indianapolis Railroad Company.
Louisville, New Albany and Chicago Railway Company.

But it is expressly stipulated and reserved on the part and in behalf of the proprietary companies, that the conditions upon which [fol. 93] any company shall be admitted to or permitted to continue in the use of said Belt Railway or the property of the Union Railway Company, are that each and every payment herein provided to be made as rental or cost of operation and maintenance, shall be regularly and promptly made, and that each and every condition herein recited, and every rule and condition that may from time to time be prescribed by said Board of Managers for the joint use of said Belt Railway or Union Railway Company property, or for the conduct of the business of either of the same, shall be fully, faithfully and fairly kept and maintained, and each company by signing the certified copy hereof as aforesaid, covenants and binds itself to pay, observe and perform as herein provided, and that its right to joint use of said property or any part thereof may be terminated absolutely on thirty days' notice from the chairman of said Board of Managers, based upon due action by said Board, in the event of its failure or default in respect to either of the payments, stipulations, obligations or conditions herein set forth or provided for, all of which conditions are hereby declared to be essential. No railroad company other than those hereinbefore mentioned in this article shall hereafter be admitted to a use of said joint prop-rty save with the unanimous consent, duly recorded, of said Board of Managers. And it is distinctly understood and agreed that no company so admitted or to be admitted shall be or become, in any sense, a member of said Indianapolis Union Railway Company, or the owner of any portion of its capital stock or of any

proprietary interest in its property, but that the organization and composition of said Union Railway Company shall be and remain as they now are, unless otherwise arranged by the proprietary companies.

Fourteenth. The grant of right of joint use of said Belt Railway and of said Union Railway Company property, subject to the conditions above stated, is hereby made perpetual to the companies accepting the same and executing a certified copy of this agreement as aforesaid. And inasmuch as the large prospective outlay for new and extended facilities as herein contemplated by the Union Railway Company is about to be incurred mainly in the interest of the companies other than the proprietary companies, said companies do each by their acceptance of this grant, and especially by their signing and sealing the certified copy hereof, bind and obligate themselves severally, their successors and assigns, to forever continue in the joint use aforesaid, and subject to and upon the terms and conditions herein stated.

Fifteenth. If at any time a difference of opinion shall exist in respect to the rights or duties of any company using the Union Depot [fol. 94] or Belt Railway property under this agreement, or under the rules which may be adopted, or terms and conditions which may be prescribed by the Board of Managers, the question in dispute shall be referred to a Board of Arbitrators, consisting of three competent disinterested persons, one of whom shall be chosen by the party making complaint, and the other by the chairman of the Board of Managers, and the two so chosen shall select a third. The party desiring such arbitration shall give written notice of the same to the Chairman of the Board of Managers, setting forth therein definitely the point or points in dispute, and name the person selected by such party to act as arbitrator.

In event that the party on whom such notice shall be served shall not, within fifteen days of such service, name a second disinterested person to act as arbitrator, the party giving such notice shall select the second, and the two thus chosen shall select a third.

The Board of Arbitrators thus chosen shall proceed at once to hear, consider and determine the matter submitted to them, and shall give to each of the parties to such matter of difference notice which shall be not less than ten days, of the time and place of hearing; and at the time and place appointed, shall proceed with the hearing, unless for good cause, of which the arbitrators shall be the judges, it shall be postponed to some later day or days. And the determination of the arbitrators thus constituted, or a majority of the persons composing the same, to be made in writing, and a copy thereof to be delivered to each of the parties, shall be final and conclusive upon the parties in reference to matters thus submitted.

In testimony whereof, the parties have caused this agreement to be executed by their proper officers, and their several corporate seals to be hereto affixed, the day and year first above written.

Chicago, St. Louis and Pittsburgh Railroad Co.

By J. N. McCullough, First Vice-President.

Attest: S. B. Liggett, Secretary. (Seal C., St. L. & P. R. R. Co.) Jeffersonville, Madison and Indianapolis Railroad Co., by G. B. [fol. 95] Roberts, President. Attest: Geo. S. McKiernan, Secretary. (Seal J., M. & I. R. R. Co.) Cincinnati, Indianapolis, St. Louis and Chicago Railway Co. By M. E. Ingalls, President. Attest: E. F. Osborn, Secretary. (Seal C., I., St. L. & C. Ry. Co.) Terre Haute and Indianapolis Railroad Co., by W. R. McKeen, President. Attest: Geo. E. Farrington, Secretary. (Seal T. H. & I. R. R. Co.) The Cleveland, Columbus, Cincinnati and Indianapolis Railway Co., by J. H. Devereux, President. Attest: Geo. H. Russell, Secretary. (Seal C., C., C. & I. Ry. Co.)

That the aforesaid agreement was later signed by the following raodroad companies, at the following named times:

Indianapolis & Vincennes Railroad Company, December 14, 1883.
Indianapolis, Decatur & Springfield Railway Co., December 14, 1883.

Indiana, Bloomington & Western Railway Company, December 14, 1883.

Indianapolis & St. Louis Railroad Company, December 24, 1885.
Cincinnati, Hamilton & Dayton Railway Company, September 15, 1888.

Louisville, New Albany & Chicago Railway Company, June, 1890.
Indianapolis Southern Railway Company * * *

And as provided in said agreement of September 20, 1883, an appraisement of the property of the Indianapolis Union Railway Company was made and the total value of the Union Railway and Belt Railroad was fixed at the sum of one million one hundred [fol. 96] seventy-one thousand nine hundred fifty-nine dollars and ninety-one ($1,171,959.91) cents.

That under the date of March 14, 1884, the several railway companies, successors in title of the original incorporators of the Indianapolis Union Railway Company and the original signatory parties of the agreement of September 20, 1883, made, executed and delivered their certain indenture of conveyance whereby they severally conveyed and warranted to the Indianapolis Union Railway Company the several tracts of land and all other property, the technical legal title of which up to that time had been held by one or the other of said railroad companies, which were parties of the first part, respectively, in each of the said instruments of conveyance.

That at its session in 1884 and 1885, the General Assembly of the state of Indiana enacted a statute entitled "An Act for the Incorporation of Union Railway Companies in or near towns or cities where two or more railroads enter or pass through," etc., approved March 2, 1885, to which reference is here made and which is made a part of this petition by reference to the same as it appears in the Acts of the Indiana Legislature of 1885 at page 30.

That in conformity with the provisions of said statute of March 2, 1885, the Indianapolis Union Railway Company duly accepted

the provisions of said last named statute on the 25th day of March, 1885.

That on the 20th day of August, 1906, a certain written agreement amendatory of said agreement of September 20, 1883, was made, executed and delivered and the same was and is in the words and figures as follows:

AMENDMENT—PARAGRAPH "ELEVENTH" OF THE AGREEMENT OF SEPTEMBER 20TH, 1883

Whereas, heretofore on the 20th day of September, 1883, by an instrument in writing, upon a true and full copy of which this pres- [fol. 97] ent instrument is endorsed, certain five railroad companies, therein called the "proprietary companies" and therein recited to "constitute what is known as the Indianapolis Union Railway Company" of the City of Indianapolis, Marion County, Indiana, entered into the covenants and agreements therein expressed, consecutively numbered and paragraphed therein from "First" to "Fifteenth," both inclusive: and whereas afterward, agreeably to paragraph "Fourteenth" thereof, divers other railroad companies acquired the right to the joint use of the tracks, union passenger station and other facilities of the said Indianapolis Union Railway Company, by accepting the terms and provisions of said contract and evidenced such acceptance by "signing and sealing" a certified copy of said contract: and

Whereas, Experience has demonstrated that paragraph "Eleventh" of said contract, as written, is impracticable of performance in the management and operation of said Union Railroad to the extent of the engagement therein expressed in the words "except property used in common," and it is the wish and purpose of all the railroad companies interested in or using said Union Railway Company's property, both the proprietary companies and the said associate companies, that said Paragraph "Eleventh" be modified by striking therefrom the said ph-ase "except property used in common."

It is therefore agreed by the undersigned, viz: the Pittsburgh, Cincinnati Chicago & St. Louis Railway Company, owning what were formerly the Chicago, St. Louis & Pittsburg Railroad and the Jeffersonville, Madison & Indianapolis Railroad; the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, owning what were formerly the Cincinnati, Indianapolis, St. Louis & Chicago Railroad and the Cleveland, Columbus, Cincinnati & Indianapolis Railroad and the Indianapolis & St. Louis Railway; and the Vandalia Railroad Company, owning what were formerly the Terre Haute & Indianapolis Railroad and the Indianapolis & Vincennes Railroad, said three companies, parties thereto, being respectively possessors in title as aforesaid of the said five proprietary companies, parties to said contract of September 20th, 1883, upon a copy of which this instrument is endorsed, and by said Indianapolis Union Railway Company that said paragraph "Eleventh" of said contract is hereby modified to read as follows:

"Eleventh. Each company using said Union Depot property or said Belt Railway, shall be responsible for loss to person or property which may arise out of the conduct or neglect of its own employes: claims for loss or damage to person or property, including property used in common, arising out of the conduct or neglect of employees [fol. 98] paid in common, shall be paid by the Union Railway Company, and all money so paid by it shall be charged to the current account of expenses of operating and maintaining said Belt Railway or said Union Railway property, as the case may be, and paid as provided in article eighth."

And that said contract of September 20th, 1883, as thus changed, but changed in no other respect, shall continue in force as though said paragraph had been from the beginning as it is now, by this modification, made to read, and each of the other railroad companies having, or that may hereafter be granted, joint use of said Indianapolis Union Railway Company property, shall, and each of them does, bind itself, its successors and assigns, by signing and sealing a certified copy of this present contract, to forever continue in the joint use aforesaid, and subject to and upon the terms and conditions of said contract of September 20th, 1883, as modified by this present contract.

In Testimony Whereof, the parties hereto, viz: the said three proprietary companies and said Indianapolis Union Railway Company, have caused this agreement to be executed by their proper officers and their several corporate seals to be hereto affixed this 20th day of August, 1906.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by Joseph Wood, Vice-President. Attest: S. B. Liggett, Secretary. (Seal P. C. C. & St. L. Ry. Co.) The Cleveland, Cincinnati, Chicago & St. Louis Railway Co., by W. H. Newman, President. Attest: D. W. Pardee, Secretary. (Seal C., C., C. & St. L. Ry. Co.) Attest: S. B. Liggett, Secretary. (Seal.) Vandalia R. R. Co. The Indianapolis Union Railway Company, by James McCrea, President. Attest: W. T. Cannon, Secretary. (Seal Indianapolis Union Ry. Co.)

[fol. 99] That said amendatory agreement of August 20, 1906, was after said last named date signed by the following railroad companies at the following named times:

Chicago, Indianapolis & Louisville Railway Co., Jan. 29, 1907.
Indianapolis Southern Railroad Company, February 5, 1907.
Peoria & Eastern Railway Company, February 18, 1907.
Lake Erie & Western Railroad Company, February 18, 1907.
Cincinnati, Indianapolis & Western Railway Co. Feb., 1907.

That after September 20, 1883, by consolidation proceedings duly taken and had, the Chicago, St. Louis & Pittsburg Railroad Company and the Jeffersonville, Madison & Indianapolis Railroad Company, signatory parties to said agreement of September 20, 1883, became and still is the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and the Cincinnati, Indianapolis, St. Louis &

Chicago Railway Company and the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, signatory parties to said agreement of September 20, 1883, became and still is the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the Terre Haute & Indianapolis Railroad Company, a signatory party to said agreement of September 20, 1883, and the Indianapolis & Vincennes Railroad Company, associate party to said agreement of September 20, 1883, became and still is the Vandalia Railroad Company; and each of said consolidations was made and became effective long prior to the institution of each of the above entitled suits.

That by proceedings duly had, the railroad of the Indianapolis, Decatur & Springfield Railway Company hereinbefore mentioned, became the property of the Indianapolis, Decatur & Western Railway Company, and the railroad operated by the Cincinnati, Hamilton & Dayton Railway Company, one of the signers of the said agreement of September 20, 1883, became the property of the Cincinnati, Hamilton & Indianapolis Railway Company; that the Indianapolis, Decatur & Springfied Railway Company and the Indianapolis, Decatur & Western Railway Company duly made payment to the Indianapolis Union Railway Company of the several amounts of money from time to time required to be paid to the Indianapolis Union Railway Company under the provisions of said agreement of September 20, 1883, and the Cincinnati, Hamilton & Indianapolis Railway Company, either by itself or by the Cincinnati, Hamilton & Dayton Rail-[fol. 100] way Company, duly made payment of the several amounts of money payable by the agreement of September 20, 1883, to the Indianapolis Union Railway Company.

That by proceedings duly had, the Cincinnati, Hamilton & Indianapolis Railway Company, and the Indianapolis, Decatur & Western Railway Company were consolidated under the name of the Cincinnati, Indianapolis & Western Railway Company, which is the defendant of that name in the above entitled suits; and said Cincinnati, Indianapolis & Western Railway Company duly made payment to the Indianapolis Union Railway Company of the several amounts of money that, from time to time, became due and payable under the provisions of said agreements of September 20, 1883, and August 20, 1906, and the said Indianapolis, Decatur & Western Railway Company and the said Cincinnati, Hamilton & Indianapolis Railway Company and the receivers of said Cincinnati, Indianapolis and Western Railway Company in a like manner made payment, from time to time, of the several amounts of money that were payable to the Indianapolis Union Railway Company by the Indianapolis, Decatur and Western Railway Company and the Cincinnati, Hamilton & Indianapolis Railway Company, respectively, as the constituent companies of said Cincinnati, Indianpolis & Western Railway Company. That conformably with the decree in the above entitled causes rendered by the said District Court for the Southern District of Ohio and the ancillary jerisdictions, a sale of the property of the Cincinnati, Indianapolis & Western Railway Company was made and the property passed by assignment to the Cincinnati, Indianapolis and Western Railroad Company, which pursuant to

said decree submitted itself to the jurisdiction of the aforesaid Court and is now subject to the orders of said Court with respect to the provisions of said decree of foreclosure aforesaid.

That neither the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Vandalia Railroad Company nor the Indianapolis Union Railway Company was a party to the said suits or in any way subject to the jurisdiction of the aforesaid Court in the above entitled causes.

That the right of way of the Cincinnati, Hamilton & Indianapolis Railway Company did not reach and touch the right of way of the Indianapoils, Decatur and Western Railway Company physically [fol. 101] at the time of the consolidation of the two railway companies, and it never has so reached and touched said last named right of way, but the railroad tracks of the Cincinnati, Hamilton & Indianapolis Railway Company and the Indianapolis, Decatur and Western Railway Company were brought in connection with each other through and by means of the Union Tracks and the Belt Railroad of the Indianapolis Union Railway, the right to the use of which tracks respectively by the Cincinnati, Hamilton & Indianapolis Railway Company and the Indianapolis, Decatur & Western Railway Company was secured and maintained under and by virtue of the provisions of the above mentioned agreements of September 20, 1883, and August 20, 1906, and not otherwise.

That the Cincinnati, Indianapolis & Western Railroad Company is a corporation organized and existing under the laws of the States of Ohio, Indiana and Illinois, and that the law of the State of Indiana under which it is so organized, is a statute of the State of Indiana entitled "An Act to authorize, regulate and confirm the sale of railroads, to enable purchasers of the same to form corporation," etc. approved March 3, 1865, to which reference is hereby made and which, by reference, is made a part of this petition.

That within a short time after its incorporation as aforesaid, the Cincinnati, Indianapolis & Western Railroad Company by virtue of the orders and decrees of the aforesaid Court in the above entitled cause, went into possession of the railroad of the Cincinnati, Indianapolis & Western Railway Company, including the rights of said last named railway company in and to the use of the railroad tracks, stations and facilities of the Indianapolis Union Railway Company and the Belt Railroad and Stock Yards Company aforesaid leased to the Indianapolis Union Railway Company.

That the Cincinnati, Indianapolis & Western Railroad Company, since it entered into the possession of the railroad property of the Cincinnati, Indianapolis & Western Railway Company, and assumed the right so to do under the orders and decrees of the aforesaid Court in the above entitled cause, has sought to refuse and reject one of the two contracts and agreements existing between the Cincinnati, Indianapolis & Western Railway Company and the Indianapolis Union Railway Company by virtue of the agreements respectively of the Indianapolis, Decatur and Western Railway Company and the Cincinnati, Hamilton & Indianapolis Railway Company so as aforesaid

[fol. 102] executed and entered into by said two last named railway companies, in the manner and form hereinbefore set forth.

These petitioners, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Vandalia Railroad Company and the Indianapolis Union Railway Company, respectively and jointly, deny the right of the Cincinnati, Indianapolis & Western Railroad Company so to refuse and reject either of said two contracts and affirm that the Cincinnati, Indianapolis & Western Railroad Company is bound by both of said two contracts for the use of the property of the Indianapolis Union Railway Company and is required to make payment upon each of said two contracts of the full amount that would have been payable thereunder by the Indianapolis, Decatur & Western Railway Company, and the Cincinnati, Hamilton & Indianapolis Railway Company at this time if the aforesaid consolidation had not been made and if the property of the Cincinnati, Indianapolis & Western Railway Company had not been sold under the decrees of the aforesaid Court in the above entitled cause and the sale confirmed in the Cincinnati, Indianapolis and Western Railroad Company.

These petitioners further aver that the Cincinnati, Indianapolis & Western Railroad Company, in so attempting to refuse and reject one of said contracts and agreements for the use of the property of the Indianapolis Union Railway Company, and in so claiming the right to make such refusal and rejection, under the provisions of the decree of foreclosure and sale by which it acquired the title of the property of the Cincinnati, Indianapolis & Western Railway Company, is acting without warrant of law and contrary to the provisions and intent of said decree of foreclosure and this petitioner prays the court that the Cincinnati, Indianapolis & Western Railroad Company shall, within a short time to be fixed by the Court, be required to show cause, if any it has, why it shall not be ordered by the aforesaid Court to make full payment to the Indianapolis Union Railway Company of the full amount that would have been payable to the Indianapolis Union Railway Company by the Cincinnati, Indianapolis & Western Railway Company if it had continued in the use and enjoyment of the railroad property, rights and privileges described in and ordered to be sold by the decree of foreclosure and sale made and entered by the aforesaid Court in the above entitled [fols. 103 & 104] causes, and that your petitioners shall have such other and further relief as the equity of the case may require.

And your petitioners will ever pray, etc.

The Indianapolis Union Railway Company, by Baker & Daniels, its Attorneys. The Cleveland, Cincinnati, Chicago & St. Louis Railway Co., by L. J. Hackney, General Counsel. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by Maxwell & Ramsey, Attorneys. Vandalia Railroad Company, by Maxwell & Ramsey, Attorneys.

[fol. 105] MOTION TO DISMISS—Filed December 1, 1916

To the Honorable, the Judges of Said District for the Southern District of Ohio, Western Division:

Comes now The Cincinnati, Indianapolis & Western Railroad Company and moves the Court to dismiss the petition filed herein October 24, 1916 by The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and The Vandalia Railroad Company on the grounds that:

First: This Court is without juirsdiction in this cause to make the order or grant the relief for which the petitioners pray, or any part thereof.

Second: The facts alleged are insufficient to constitute a valid cause of action in equity against said The Cincinnati, Indianapolis & Western Railroad Company.

George H. Warrington, Morison R. Waite, Harvey J. Elam, Solicitors for the Cincinnati, Indianapolis & Western Railroad Company.

[fol. 106] OPINION ON MOTIONS TO DISMISS PETITION OR ANCILLARY BILLS—Filed January 9, 1918

Heard on motions in the above entitled causes of Cincinnati, Indianapolis & Western Railroad Co. to dismiss petitions of similar purport filed in each case by Indianapolis Union Railway Co., the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., and the Vandalia Railroad Co.

Two questions are involved: (1) jurisdiction of the court to entertain the petition; and, if so, (2) whether or not the facts are sufficient to constitute a cause of action in equity.

The facts are found in the petitions and in the records of the two suits in foreclosure. Certain statutes of Indiana are facts also to be considered. The Cincinnati, Indianapolis & Western Railway Co., hereinafter called "Railway," was formed by the consolidation of the Cincinnati, Hamilton & Indianapolis Railway running from Hamilton, Ohio, to Indianapolis, and with the Indianapolis, Decatur & Western, running from Indianapolis to Springfield and elsewhere in Illinois. By the consolidation, the Railway became one railroad from Hamilton to Springfield, through Indianapolis. The Cincinnati, Hamilton & Indianapolis, coming from the east, terminated at the property of the Union Railway, and the Indianapolis, Decatur & Western property, coming from the west, terminated at the property of the Union Railway; so that the Union Railway's depot and facilities (with the belt line) became the connecting link between the properties of the constituent companies making up the railway. The use of the facilities of the Union Railway became an integral part of the railway's continuous line, without which it could not, so far as appears, have been operated.

The Union Railway's property at Indianapolis, including the belt line, is owned by the Union Railway and certain proprietary companies; and the constituent companies (known, with other railroad companies, as "associate" companies) had become entitled to the perpetual use of the Union Railway's facilities and belt line, conditioned only upon the payment of rental based on a percentage of the appraised value of the facilities through a contract, September 20, 1883, made pursuant to sections 5345, et seq., 2 Burns' Ann. In- [fol. 107] diana Stat. of 1914. Afterwards, by virtue of section 5356, et seq., of those statutes, the provisions of which were adopted by the Union Railway, each contracting railroad was entitled to a single representative on the board of managers, whose duty it was to operate the property subject to the joint use of the railroads, parties to the agreement. The constituent companies had no proprietary interest in the property of the Union Railway, but the statute provided (Section 5350):

"It may be lawful for any other railroad company not originally concerned in the formation or construction of such union road, to thereafter enter and take such an interest in the same, in such manner and upon such terms as may be agreed upon by the parties; and companies so entering into such union shall have all the rights and privileges conferred thereon by the provisions of this act."

Sanctioned, as they were, by express statutory authority, such rights as the constituent companies had in these facilities became franchises of the constituent companies, and each had such share in the use and control of the facilities as that their votes were required in making the unanimous consent necessary for admission of any other railroad.

The constituent companies, by their merger into the Railway Co., did not lose their respective franchises and contract rights, but the consolidated company took over their franchises and succeeded to their respective contract rights and obligations. This was recognized by the Railway, which, though using the facilities as a link in its through line and, no doubt, also for the receipt and delivery of passengers and freight at Indianapolis, made no question of the right of the Union Co. to require it to pay two parts of the rental. This went on for years, and the receivers of the Railway appointed in the above entitled causes continued to pay the two parts of the rental for the use of the facilities connecting what would otherwise be separate properties.

Foreclosure of the certain mortgages described in the bills was had in this court, the decrees (June 29, 1915), expressly providing for the sale of the franchises of the Railway and the "Contract of September 20, 1883, and the amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis."

On the presumption that the master conducting the sale did what [fol. 108] the decree directed him to do, it will be assumed that the contract of September 20, 1883, with its amendment and the franchises of the Railway Co. were carried into the deed as a part of the

property conveyed to the purchaser, to whose rights and obligations his assignee the Railroad Co. has succeeded.

By that deed, the purchaser and his assignee acquired all that the deed conveyed; no more and no less. By it the Railroad Co. acquired the franchises of the Railway Co. and the rights and obligations of the Railway Co. and of its constituent companies, as fixed by the terms of the contract and established by statutory law. The deed continued the right to the Union Railway Co. and the other proprietary companies to exact for the use of the Union facilities and belt line the same rental that was paid by the Railway Co. and, before it, by its constituent companies.

There was, however, a clause in the decrees of foreclosure providing:

"The purchaser and his successors or assigns shall have the right, for the period of thirty days after the delivery of the deed or instruments of transfer from the Special Master hereinafter provided for, to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company, or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this Court within said period of thirty days."

The Railroad Co. claims the right, under that clause, to reject the contract so far as it binds one or other of the constituent companies. From the brief of counsel it may be inferred that the Railway Co. seeks to reject the rights and obligations under the contract of the Indiana, Decatur & Western. Counsel for the Railroad Co. in their brief say, and no denial appears, that the steps provided in the clause as a basis for rejection have been taken. It will be assumed that they have been taken. By the deed, that which the court ordered sold was actually conveyed. The title to the property of the Railway, including its franchises and obligation to pay the contract rentals of its constituent companies, passed to the purchaser. The Railway's contract was a single obligation to pay the two rentals. The purchaser's rights and obligations under the contract became fixed by the deed and were the same as its predecessor, the Railway Co.'s. [fol. 109] It enjoyed the same benefits and became subject to the same obligations. Not only were its rights and obligations fixed, but the rights and obligations of the Union Railway and its proprietary companies and associate companies not having been interrupted, became even more firmly established. They were the same as before. The contract, in full life and unimpaired, passed to the purchaser by the deed.

It is said that an election provided in a decree for foreclosure for railroad properties not to be found by such contracts as these has the sanction of many decisions of the federal courts. It would not be useful to analyze these cases here, but counsel have cited no case and the court has found none, in which there was a decree giving the

purchaser the right to elect after the deed had passed to him conveying the contract. It is not necessary to decide that the cases cited would be applicable in the event the decree gave the purchaser the right to elect prior to the delivery of the deed to him, and whether or not, even under those circumstances the rights in such contracts as those of parties not before the court could be cut out; but it would seem, and it is now held, that, under the facts disclosed, the court did not and could not foreclose the rights of the petitioners in those contracts without a hearing. They were not parties to these suits.

But if it is possible to afterwards elect not to be bound by a contract, bought, paid for and assumed by acceptance of the deed conveying it, yet this was an entire contract of the Railroad to pay both rentals. "The new" (consolidated company) "assumed the liabilities and succeeded to the rights of the old" (constituent companies). Paine vs. Railroad Co., 31 Ind. 283, 349. "* * * the act of consolidation involves an implied assumption by the new company of all the valid debts and liabilities of the consolidated companies." Louisville, etc., Ry. Co. vs. Boney, 117 Ind. 501, 504, 505. The Railway Co. was in fact a party to the amendment of August 20, 1906. The contract was not, after conveyance at least, divisible. The purchaser took the entire contract of the Railway, or none of it. If it continued the use it acquired by virtue of the contract, the obligation to pay for the use necessarily followed. The Railway Co. and the Railroad Co., so far as appears from the facts, cannot be said to have exercised, in any particular operation or movement of passenger or freight, one right to use or the other. The test is not what [fol. 110] use the purchaser desired to exercise, or in practice does exercise, but what obligation he has assumed to pay for any use. If he claims, as he does, the right to use by virtue of the contract which bound his predecessor, he must submit to the terms that contract imposed. Some light may be had from a decision of the supreme court of Missouri (Union Depot Co. vs. Chicago, etc., Ry. Co., 113 Mo. 213, 224, 225):

"But it is argued that it is against the spirit and intent of the contract to allow the Rock Island company, a party to the depot contract, to buy up an independent rent-paying line, and in this way deprive the depot company of the rents which it would otherwise receive, and at the same time deprive the railroad companies, parties to the contract, of the rents to which they are entitled under the contract. If the Rock Island company had purchased a road belonging to another company, a party to the contract, the depot company would not lose the rental which the selling party had agreed to pay. And this is true whether we regard the contract of the selling company with the depot company as one running with the land in favor of the depot company or not. The sale of the road belonging to one company to another company, both being parties to the depot contract, would and could not affect the contract rights of the depot company."

This case is cited in St. Joseph Union Depot Co. vs. Chicago, etc., Ry. Co., 131 Mo. 291, 305, 306.

The clause describing the contract to be sold and the clause of election may be reconciled by holding that what was intended must have been some other contract of the Railway Co., or of its constituent companies, than that under which the Railway and its successor, the Railroad exercises the use of the Union facilities and belt line. Such a conclusion requires a construction, interpretation and explanation of the decrees.

Another consideration presents itself. The property of the Railway was sold subject to the liens of certain mortgages on the constituent companies. The mortgagees are not parties. The court has not seen the mortgages, but it may be assumed that each of the constituent companies conveyed in its mortgage the franchises and contract rights each had, among which were the right each had to use these facilities on the payment of the rent it had agreed to pay.

The uncertain future has in it at least the possibility that the underlying mortgage of the Cincinnati, Indianapolis & Decatur may [fol. 111] be foreclosed. Can it be doubted that the mortgagee would have the right to have its franchises and contract rights in the use of these facilities sold and that the purchaser would succeed to them? If this election stands, the purchaser of the Indianapolis, Decatur & Western would have a railroad without terminal facilities at Indianapolis, although that road had a perpetual franchise and the contract right to use those terminals conditioned only upon the stipulated payment of rental, a use which has been exercised continuously to this day and is now being exercised.

These petitions are in form intervening petitions, but it would seem that the petitioners' rights, such as they may be, cannot be exercised with respect to the proceeds of sale; for, by the deed the property itself passed to the purchaser to be retaken by the court only in the event the purchaser failed to comply with the terms of the sale. If it is true, as claimed by petitioners, that the contract of each constituent company assumed by the Railway Co. is in the nature of a convenant running with the land, they were embodied in the contract sold and conveyed so that nothing was left undisposed of by the decree, as far as they were involved. If the contract were included in the lien of the underlying mortgages, that lien is preserved, notwithstanding the election not to be bound by one of them. The question of the rights of the mortgagees in the underlying mortgages does certainly lurk in the case.

The reservations in the decree for future action by the court do not cover such rights as the petitioners may have in these contracts. The menace to their rights, though caused by the Railroad's acts under claim of right because of the decrees, has arisen after the decree was passed, and the question is as to the remedy.

These petitions are in no sense actions for money. Their purpose is to prevent the operation of decrees of this court with respect to a subject in which the petitioners have, and had before the decrees were passed, a vital interest, and which was never adjudicated as to them. Whether the petitions are strictly bills quia timet, or bills to remove a cloud upon title, is not material. They may partake somewhat of the nature of each. It is said in Bispham's Principles of

Equity, (7th Ed.) Section 568, that bills to remove a cloud may sometimes also fall under the head of relief quia timet. He says that that principle upon which bills to remove a cloud are based, is that it is inequitable that the party in possession should be embarrassed [fol. 112]by having hanging over him a hostile claim which, although not actively asserted and not of any validity, is, nevertheless, calculated to affect the marketing of his title. The jurisdiction of courts of chancery in such cases is well established; and he says, also, speaking of bills quia timet:

"The principle upon which the court acts in such cases is that justice sometimes requires that a man shall not be compelled to have hanging over him or his title for an indefinite time some claim or demand or liability which, if enforced, would subject him to loss, but that he is entitled to have the questions relating to his rights settled at once and forever, to have the claim against his rights immediately enforced, or to be presently made secure against any future liabilities." Bispham's Eq. Pr. (7th Ed.) Sec. 575.

The petitioners' title and the title of all the other railroads using the facilities and belt line is clouded by the claim of the Railroad that they must readjust the terms upon which they and the Railway used the Union facilities and each submit to an increase in the amount of rental paid by each and that it is not bound to pay the share of rental the constituent companies agreed to pay and which its predecessor agreed to pay. If the Railroad does not pay the two rentals but continues the same use of the facilities as its predecessor, the rights of the Union Railway in its own property and of the proprietary railroads interested are affected indefinitely and until the right of the railroad to abandon, as against the petitioners' a part of the contract is somehow determined.

The subject of remedy presents some difficulties, but I think the petitions may be regarded as auxiliary to and ancillary to the foreclosure suits in which they were filed, and dependant on those suits for jurisdiction.

In such cases the citizenship of the petitioners, the amount involved, or the existence of a federal question are immaterial. It is true the petitioners were not parties to the foreclosure suits, but they have an interest in the decrees in those suits, which it is claimed shut out their rights. Though not parties, they were in privity of contract with the Railway Co. and its constituent companies. They seek equitable relief against decrees of this court, apparently final but which do them an injury and with respect to which they had no opportunity to be heard. While it may be difficult to find a decision on the exact question (this court has found none), yet under definitions to be found in the decisions of the supreme court and of [fol. 113] some of the subordinate courts, there would seem to be ample authority for holding, and it is now held, that these petitions are anciliary bills, even in the strict sense, and that this court has jurisdiction over them and the parties. These petitions are really continuations of the causes from which they spring. It was said by Mr. Justice Miller in Minnesota Co. vs St. Paul Co., 2 Wall. 609, 632:

"The present suit is really a continuation of that one. The rights of the parties depend upon the construction which is placed upon the acts of the court in it; and the present bill is necessary in order to have a declaration of what was intended by the orders and decrees made in that suit, and to enforce the rights which were established by it."

See also what he says at page 633.

The cases are numerous. It would be useless to analyze them. It was said by Judge Sanborn in Campbell vs Mining Co., 141 Fed. 610, 612:

"But a suit in equity, dependant upon a former suit of which the federal court has jurisdiction, may be maintained in the absence of a federal question and of diversity of citizenship (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon or claims to, property in the custody of the court in the original suit. Such a suit is but the continuation in a court of equity of the original suit, to the end that more complete justice may be accomplished thereby."

And he makes this summary of the decision in Minnesota Co. vs St. Paul Co., 2 Wall. 609:

"A bill to construe orders and decrees in a former suit in equity is a dependent bill, and may be sustained against those who claim under, or are interested in, the orders and decrees whose interpretation is sought."

Judge Reed, after reviewing the authorities, said (Ferguson vs Omaha & S. W. R. Co., 227 Fed. 513, 519, C. C. A. 8):

"An ancillary bill or suit may, in a general way, be said to be a suit or proceeding in equity growing out of a prior suit in the same court, dependent upon, and instituted for the purpose either of impeaching or enforcing the judgment or decree in the prior suit, to the end that more complete justice may be done among all parties in interest; and the jurisdiction of such a suit is dependent upon the jurisdiction of the court of the prior suit."

[fol. 114] See also cases cited in Brum vs Mann, 151 Fed. 145, 150, and in Eichel vs U. S. Fidelity & Guaranty Co., decided by the supreme court November 5, 1917.

Judge Sanborn, in the case cited, says (p. 613) that the dependent bill must of necessity set forth in itself a cause of action in equity. If that view is correct the requisite he prescribes is found in these petitions, for bills quia timet and to remove a cloud have always been considered to be within the jurisdiction of courts of equity.

In Eckman vs Eckman, 5 P. F. Smith, 269, 273, it is said:

"Not only are accident, mistake and fraud recognized grounds of relief, but if an instruments ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for a sinister purpose, and, according to Judge Story,

the modern decisions entitle him to relief quia timet: 1 Story's Eq. Section 700."

While "sinister" is too strong a word to be used in this case, yet the decrees do work injustice to the petitioners, and, as they have a vital interest in the res; were not heard; are in privity of contract with the Railway Co., and as the purchaser claims their rights are foreclosed by the decrees, it is now held that this court has jurisdiction to entertain the petitions as ancillary bills, and, in the exercise of its jurisdiction, that the facts alleged are sufficient to constitute a valid cause of action against the Railroad Co.

The motions to dismiss will be overruled and the Railroad Co. may have thirty days within which to answer.

Hollister, District Judge.

Lawrence Maxwell, Baker & Daniels, L. J. Hackney contra.
Morison R. Waite, George H. Warrington, J. W. Fesler, Harvey J. Elam, Howard S. Young, for the motions.

[fol. 115] Order Overruling Motion to Dismiss—Filed March 2, 1918

This cause came on to be heard on the motion of The Cincinnati, Indianapolis and Western Railroad Company to dismiss the petition filed herein on October 24, 1916, by The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company and the Vandalia Railroad Company, was argued by counsel for said The Cincinnati, Indianapolis and Western Railroad Company and by counsel for said petitioners.

On consideration whereof the court finds that said motion is not well taken and does overrule the same and said Cincinnati, Indianapolis & Western Railroad Company is given thirty days within which to answer said petition.

To the decision and order of the Court overruling said motion said Cincinnati, Indianapolis and Western Railroad Company by its counsel duly excepts.

Hollister, Judge.

Answer of Cincinnati, Indianapolis and Western Railroad Company to Petition—Filed March 20, 1918

The Cincinnati, Indianapolis and Western Railroad Company for answer to the petition filed by the Indianapolis Union Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company and the Vandalia Railroad Company in the above entitled cause, on October 24th, 1916, says: That it has already tendered [fol. 116] or paid the Indianapolis Union Railway Company more

than it owes said company, and that the other petitioners herein have no rights to any payments whatever except as they may each ultimately receive a portion of the payments due primarily to the Indianapolis Union Railway Company.

And the Cincinnati, Indianapolis and Western Railroad Company, hereinafter termed the defendant, further answering said petition says that it is a corporation formed under the laws of Indiana and no other state; that the Indianapolis Union Railway Company was formed in the year 1883, and that the railroads interested therein entered into the contract set forth in the petition as the contract of 1883; that at that time the Indianapolis, Decatur and Springfield Railway Company was a line of railroad extending from Indianapolis westward to Decatur, Illinois, and other points, and that at that time the Cincinnati, Hamilton and Indianapolis Railroad Company was a line of railroad extending from Indianapolis eastward to the city of Rushville, Indiana, and other cities; that the Indianapolis, Decatur and Springfield Railway Company signed the contract of 1883 above referred to, in about the year 1883, and that shortly thereafter the Indianapolis, Decatur and Springfield Railway Company was succeeded by the Indiana, Decatur and Western Railway Company; that said company in the bill of complaint is incorrectly called the Indianapolis, Decatur and Western Railway Company; that said Indiana, Decatur and Western Railway Company succeeded to all the rights and obligations of said Indianapolis, Decatur and Springfield Railway Company under said contract of 1883; that this company is not informed as to the precise way in which the contract of 1883 was signed by the various companies and prays that the petitioners be required to make proof thereof, if the court deems any greater detail necessary in this matter than is admitted by this answer.

This defendant further says that the contract of 1883 was signed by either the Cincinnati, Hamilton and Dayton Railway Company or by the Cincinnati, Hamilton and Indianapolis Railroad Company; that this defendant has no information as to which company originally signed said contract, and prays that as to this the plaintiffs be required to make their proof, but this defendant does say that thereafter the Cincinnati, Hamilton and Indianapolis Railroad Company, either in its own right or as the successor of the Cincinnati, Hamilton and Dayton Railway Company, assumed the obligations [fol. 117] and acquired the rights conferred by the aforesaid contract of 1883, and that in the year 1902 the Cincinnati, Hamilton and Indianapolis Railroad Company was making the payments required under said contract and in general exercising the rights therein granted, and that in that year the Indiana, Decatur and Western Railway Company was also in general exercising the rights and making the payments required of a signer of said contract of 1883; that under said contract any railroad company which was a party to the contract of 1883, was entitled to the use of the entire property of the Indianapolis Union Railway Company and the Belt Railroad Company, and entitled to operate trains over any tracks owned or controlled by said Indianapolis Union Railway Company; that in the year 1902, the Cincinnati, Indianapolis and Western

Railway Company was formed by the consolidation of the Cincinnati, Hamilton and Indianapolis Railroad Company and the Indiana, Decatur and Western Railway Company; that no receiver for said company was ever appointed; that thereafter the Cincinnati, Indianapolis and Western Railway Company or its agents, continued to carry out each of the contracts for the use of the facilities of said Indianapolis Union Railway Company in so far as they conferred rights and obligations upon its constituent companies, to-wit: the contract made by the Cincinnati, Hamilton and Indianapolis Railroad Company or made by the Cincinnati, Hamilton and Dayton Railroad Company and adopted by the Cincinnati, Hamilton and Indianapolis Railroad Company, and the contract made by the Indianapolis, Decatur and Springfield Railway Company and adopted by the Indiana, Decatur and Western Railway Company, except that said Cincinnati, Indianapolis and Western Railway Company was in fact overcharged in some particulars, one of which is hereinafter mentioned, and that from the years 1902 to 1915, the Cincinnati, Indianapolis and Western Railway Company was a single corporation, which owned and was obligated to perform and did perform two contracts with the Indianapolis Union Railway Company in accordance with the agreement of 1883, by succeeding to the obligation of its constituent companies; that by virtue of such ownership, the Cincinnati, Indianapolis and Western Railway Company was given two votes on the Board of Managers of the Indianapolis Union Railway Company, and was also required to pay two portions of the rental charge just as if it had remained two companies; that the amendment to the contract of 1883 made in 1906 did not in any way alter this condition; that said amendment to said con-[fol. 118] tract was not signed by the Cincinnati, Indianapolis and Western Railway Company as a single company, but two separate signatures were affixed to said contract,—one as successor to the Cincinnati, Hamilton and Indianapolis Railroad Company, and another as sucessor to the Indiana, Decatur and Western Railway Company, and at the time of said amendment and at all times in dealings by the parties interested therein, said contracts were treated as not merged but as two separate and distinct contracts; that prior to the formation of the Cincinnati, Indianapolis and Western Railway Company, the Indiana, Decatur and Western Railway Company had placed a mortgage on its property, which mortgage was placed in February of 1899, and a supplemental mortgage was made December 1st, 1901; that by said mortgage the Indiana, Decatur and Western Railway Company made all of its contracts, including the contract with the Indianapolis Union Railway Company, security for the bonds secured by said mortgage; that among other contracts covered by this mortgage was the contract herein involved with the Indianapolis Union Railway Company, and that said mortgagee acquired an interest in said contract as a separate and distinct contract, which interest was in no way terminated by the subsequent consolidation with the Cincinnati, Hamilton and Indianapolis Railway Company, and was a separate and distinct interest; that thereafter a general mortgage was placed upon the entire property of the Cincinnati, Indianapolis and Western Railway Company, and that each of said

mortgages was thereafter defaulted and foreclosure proceedings had in this court; that in foreclosing said mortgages two separate suits were filed and two separate decrees were entered; that under these decrees of foreclosure, sale was ordered by this court and sale was had under both decrees; that in the suit of Central Trust Company of New York against the Cincinnati, Indianapolis and Western Railway Company, which was the suit to foreclose the mortgage of the Indiana, Decatur and Western Railway Company above referred to, this court listed as property for sale under said foreclosure proceedings, the "contract dated September 20, 1883, and amendment of August 20th, 1906, under which, tracks of the Union Railway Company are occupied in Indianapolis;" that the contract so as aforesaid adopted by the Indiana, Decatur and Western Railway Company involved in this proceeding is the only contract in existence that answers this description and is the contract that was described; that at the time said decree was entered, the mortgagees had no inter-
[fol. 119] est in the property east of Indianapolis, and had no interest whatever in the contract of the Cincinnati, Hamilton and Indianapolis Railway Company, and that this court by said order of sale expressly adjudicated and represented to purchasers that there had been no merger of contracts, and that the contract with the Indiana, Decatur and Western Railway Company was still a separate and distinct contract which the purchaser could deal with as a separate contract not merged with the contract of the Cincinnati, Hamilton and Indianapolis Railway Company, and that any other holding would have been greatly prejudicial to the mortgagees of the Indiana, Decatur and Western Railway Company, as the property covered by their mortgage could not have been burdened with amounts due under the Cincinnati, Hamilton and Indianapolis Railway Company contract without greatly impairing the value of the security.

This defendant further says that said two contracts have in fact at all times been construed by the parties thereto as two separate and distinct contracts in acting thereunder prior to this dispute, and not as merged contracts, and that there could be no liability for two rentals unless contracts are still separate and not merged.

This defendant further says that when the Special Master prepared his deed under the foreclosure of the Indiana, Decatur and Western Railway Company mortgage, said Special Master expressly recited in said deed that he conveyed the contract with the Indianapolis Union Railway Company made by the Indiana, Decatur and Western Railway Company, and that the purchaser could take the same rights that said Indiana, Decatur and Western Railway Company took, and that in said deed said contract was treated as a separate and distinct contract; that said deed further recited that it was made subject to all the terms and reservations of each of said decrees of foreclosure and sale, whether in this indenture expressly referred to or not, which terms are hereinafter further stated.

This defendant further says that at the time said foreclosure was made, there was not in force any other mortgage on the property conveyed which covered or included either contract with the Indianapolis Union Railway Company, and that at the time of said sale there were no mortgagees having any interest in either of said con-

tracts with the Indianapolis Union Railway Company, except the mortgagees in the two mortgages being foreclosed and the orders of sale expressly recited that the property was sold free from the lien [fol. 120] of any mortgage except that the decree foreclosing the general mortgage recited that that mortgage and that decree and foreclosure were subject to the lien of the Indiana, Decatur and Western mortgage, which was foreclosed at the same time but in another suit; that at the time the decrees of foreclosure in these cases were made in 1915, the Cincinnati, Indianapolis and Western Railway Company was paying two-thirteenths of the rental charge at the Union Station, or a little over fifteen (15) per cent of the total rental charge; that this rental charge was a very great burden to the said company and amounted to approximately $29,000.00 a year; that at this time, and for a considerable period prior thereto, said Cincinnati, Indianapolis and Western Railway Company was only getting about five and seven-tenths per cent of the use of the Union Railway Company property, figuring that use on a wheelage basis; that at that time there were certain track elevation projects under way in the City of Indianapolis, which would require the Indianapolis Union Railway Company to make very large additional investments, which would more than double the amount of rent to be paid after said projects were completed; that at that time the earnings from the operation of the Cincinnati, Indianapolis and Western Railway Company did not equal its expenses, and neither it nor a purchaser of the property was able to bear the burden imposed upon it by the two contracts of 1883, and that the property to be sold by this court in foreclosing the mortgages on the Cincinnati, Indianapolis and Western Railway Company would be much less valuable if the purchaser was required to take over all the contracts of the Cincinnati, Indianapolis and Western Railway Company; that this court in recognition of this fact, inserted in Folio 54 of the decree of foreclosure in each case as printed and dated June 29th, 1915, the following provision:

"The purchaser and his successors or assigns shall have the right, for the period of thirty days after the delivery of the deed or instrument of transfer from the Special Master hereinafter provided for, to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company, or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this court within said period of thirty days."

That in the same decrees this court found that certain mortgages [fol. 121] covering the property of the Cincinnati, Indianapolis and Western Railway Company were valid and should be foreclosed, and in each case a sale was decreed, all of which more fully appears from the records of this court; that thereafter separate sales were had of the property of the Cincinnati, Indianapolis and Western Railway Company under the decrees of foreclosure above described, and this defendant as assignee of the purchaser at each sale, was

delivered a separate deed to the property involved in each foreclosure, by the Special Master referred to in the decrees for foreclosure, on November 30th, 1915; that each of said deeds expressly recited that it was given "subject also to all the terms and reservations of each of said decrees of foreclosure and sale, whether in this indenture expressly referred to or not;" that as above stated the purchaser was thus given thirty days within which to determine the extent to which it would accept said deed; that thereafter within thirty (30) days, on approximately December 24th, 1915, the exact date being matter of record in this court, this defendant filed with the Clerk of this court its written election in each foreclosure suit not to assume or adopt the contract of the Indianapolis Union Railway Company formerly made with the Indianapolis, Decatur and Springfield Railway Company; that said notice in the suit of the Equitable Trust Company contained among other things, the following language:

"Please take notice that The Cincinnati, Indianapolis and Western Railroad Company is the assignee of all property sold at the foreclosure sale in this cause and is now the owner of said property by virtue of deeds signed by Noble C. Butler, Special Master herein, and Frederick H. Ecker who acted in this matter as a purchasing committee, and others, and said The Cincinnati, Indianapolis and Western Railroad Company in exercise of the rights granted to such purchaser and his successors or assigns by the foreclosure decree heretofore entered in this court, does hereby elect not to assume or adopt each of the following contracts: * * * Third. Contract dated September 20th, 1883, and amendment of August 20th, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis, in so far as such rights are conferred by the signature of the Indianapolis, Decatur & Springfield Railway Company to said contract. This assignee hereby expressly accepts such contract as made with the Cincinnati, Hamilton & Indianapolis Railroad Company, and desires to accept the benefits of the contract with said Company, and the right to occupy the tracks of [fol. 122] the Union Railway Company and the Indianapolis Belt Railway Company therein conferred. The contract referred to at No. 14 of VII of the original foreclosure decree is in fact two contracts, which were each owned by the Cincinnati, Indianapolis & Western Railway Company at the time of this foreclosure decree, by virtue of being a consolidated corporation which had succeeded to and become bound by contracts of both the Indianapolis, Decatur *and* & Springfield Railway Company and also the Cincinnati, Hamilton & Indianapolis Railroad Company. The Cincinnati, Indianapolis & Western Railroad Company theretofore now elects not to assume or adopt any obligations imposed by the contract with the Indianapolis, Decatur & Springfield Railway Company * * *."

That the notice in the Central Trust Company suit contained substantially the same language except that the contract was described as referred to at No. 11 of VI of the original decree; that by these notices this defendant rejected the contract made with the

Indianapolis, Decatur and Springfield Railway Company; that said contract so rejected had been expressly represented to the public and this purchaser as an independent contract in the foreclosure of the Indiana, Decatur and Western Railway Company mortgage, and the contract described in the rejection notice was the contract involved in the petition to which this is an answer; that a similar election was filed in each of the ancillary jurisdictions, within thirty days from the receipt of the deed above referred to, and each of said elections was filed about December 24th, 1915; that thereafter this defendant entered upon the operation of the line of railroad formerly owned by the Cincinnati, Indianapolis and Western Railway Company and purchased at the foreclosure sale of this court; that thereafter this defendant consistently maintained that it was a single railroad company possessing a single contract with the Indianapolis Union Railway Company, entitled to a single vote in the Board of Managers, and entitled to be charged only one share of the rental of the Union Railway property under the contract of 1883, and by letter mailed December 24th, 1915, expressly notified the Union Railway Company that no rights were claimed under the Indiana, Decatur and Western contract; that this defendant has in fact never claimed any rights under that contract; that at the time this defendant entered upon the operation of the property aforesaid, the rental charge under the contract of 1883 was divided into thirteen parts; that this defendant has maintained that it should be [fol. 123] counted as one railroad and not as two railroads, and that said rental should be apportioned into twelve shares, of which this defendant should pay but one, and this defendant further says that it has uniformly tendered at the time due, the amount of rental due from it figured on this basis, and that it now stands ready to pay all rental due when properly so figured, and has repeatedly tendered said amounts, which tenders have been refused.

This defendant further says that if it is charged rental on the basis of one-twelfth of the total amount to be paid, it will pay more than its full share of the expenses of the Union Railway property; that the use it makes of said property on a wheelage basis is only about five to seven per cent of the total use of the property; that if it pays one-twelfth of the rental it will pay over eight per cent of the total rental of said property, and if forced to pay two thirteenths it will pay over fifteen per cent of the total paid, and more than twice its per cent of use.

This defendant further says that its total passenger earnings out of the City of Indianapolis including passengers to and from that station, has only been about $172,000.00 per year; that the demand now made by the petitioners herein, is that this defendant pay for the rental of the terminal facilities at Indianapolis to the Indianapolis Union Railway Company, in addition to all other charges, an amount which is already about $18,000.00 a year, and which when the track elevation work now planned is completed, will amount to about $40,000.00 a year, and that the total rental charge against this company for use of the terminal facilities at Indianapolis based on two-

thirteenths would then amount to approximately $80,000.00 per year and the total charge for use of the Indianapolis Union Railroad property, including taxes and operating expenses would be about $125,000.00 per year; that said charges are wholly unreasonable and out of all proportion to any possible earnings of this company in said terminal facilities, and that if this defendant is required to meet such charges by this court, this court will thereby take a very substantially portion of the value out of the property sold by this court in its foreclosure proceedings, and out of the property which, under the decree of this court, this defendant purchased, and will modify the contract of sale in a very important particular, and that this court and its master has not offered to return the purchase money or any portion thereof, and no effort has been made to in any way rescind the contract of purchase.

That the complainants are all represented by the Indianapolis [fol. 124] Union Railway Company for the purposes of the contentions raised in this suit, and that said company and all the complainants are now estopped to present the claim herein involved, and have forfeited all rights to present their petition for the following reason:

This court in its order of sale expressly gave the defendant the right to refuse to accept any contract which it saw fit, all of which is hereinabove set out.

That in accordance with said provision, on about December 24th, 1915, and wihin the thirty days allowed by the order of sale, this defendant duly elected not to accept or adopt the contract made with the Indianapolis Union Railway Company by the Indianapolis, Decatur and Springfield Railway Company, all of which is fully stated above; that this defendant also wrote to the Indianapolis Union Railway Company a letter, which said company duly received within thirty days, and acknowledged, wherein this defendant set forth in detail its position and asserted that it was only liable to pay one share of the rental; that in addition, on about December 4th, 1915, the Indianapolis Union Railway Company filed another intervening petition in each of the foreclosure suits involved in this controversy, and in each of said foreclosure suits sought to establish a lien on the funds produced by the sale of the property to this defendant; that by the terms of the sale, the property purchased by this defendant was only a part of the property owned by the Cincinnati, Indianapolis and Western Railway Company; that by filing said intervening petition the Indianapolis Union Railway Company elected to ratify and in all things approve said sale and the terms thereof and asked to be allowed a portion of the proceeds of said sale, and did not ask that the order of sale be in any way modified, vacated or set aside; that thereafter this defendant continued to operate said property, and in the course of operating said property after taking possession thereof, expended over $120,000.00 in the repair of bridges, and over $55,000.00 in repairing and improving certain shops on the property, and also expended over $227,000.00 in repairing box cars, and expended approximately $650,000.00 in buying new cars and approximately $560,000.00 in buying new

engines, all of which equipment was purchased and obtained for the purpose of operating the property purchased at the sale conducted by this court, and that said sum was practically all expended during the spring of 1916, and was all expended prior to October 24th, 1916, the date on which the petition now before the court was filed.

[fol. 125] This defendant further says that the Indianapolis Union Railway Company by its petition filed December 4th, 1915, then became a party to proceedings in connection with said sale, and was a party thereto continuously to the present time, beginning at a date prior to the filing of the rejection notices, and that on December 4th, 1915, it became chargeable with knowledge of the terms of said sale, and that said Indianapolis Union Railway Company in fact, during the month of December, 1915, was given actual information as to the terms of sale so far as the contracts here involved were concerned, and was given notice of the construction of the contract of sale adopted by this defendant; that thereafter said intervening company failed to file any other additional petition, or take any steps whatever in any court to question the construction so adopted, until this petition was filed; that said intervenor also had knowledge that this defendant had expended large sums in rehabilitating and operating the property purchased, and in fact handled through its station large numbers of the new engines and cars purchased, and had general knowledge that large amounts were being expended along the road; that notwithstanding such knowledge and information, this intervenor allowed this defendant to proceed with such expenditures without objection and also allowed this court to distribute the money received from such sale and thereby put the parties to such sale in such position that it was impossible to rescind the sale and place the parties in statu quo; that in addition a contract of settlement was made as appears from the records of this court after the intervening petition now under consideration was filed, wherein the Indianapolis Union Railway Company accepted the benefit of $2,500.00 of the proceeds of said sale in settlement of the questions raised in the petition filed December 4th, 1915; that the present petition is an effort upon the part of the intervening petitioners to have this court modify the terms of sale under which the property was purchased and under which said money was paid, and that this court has no right to so modify the terms of sale without first tendering back the money received, and placing the parties in as good a position as they were before the sale; that this petitioner has rendered this impossible and thereby estopped itself from further proceeding with this petition, and by its laches and delay in presenting the contentions now advanced, and by accepting part of the proceeds of sale and thereby electing to ratify the sale, the petitioners herein have placed [fol. 126] themselves in such position that they are not entitled to proceed with this petition.

This defendant further says that in addition to the improper demands of the Union Railway Company above described the said com-

pany has also been charging this defendant excessively for the use of the Union Station in the following way: The contract of 1883 in its eighth paragraph provides that the expenses at the Union Station shall be apportioned and paid on a wheelage basis, additional to the rental charge, so, as aforesaid, in controversy, that when said contract is properly construed, the charges at the Union Station should be apportioned among the various railroad companies using said station, on the basis of the number of cars entering and leaving said station.

This defendant further says that the Indianapolis Union Railway Company has not been apportioning the expenses among the various companies using said station, on a wheelage basis, but has been apportioning said expenses on the basis of the number of trains using said station; that other companies making use of said station run many long trains, including trains of nine or ten cars; that this defendant for the most part, handles short trains of three or four cars each, and that for that reason the method of apportioning the expenses followed by the Indianapolis Union Railway Company works to the injury of this defendant, and requires it to pay more for the use of the Union Station than it would have to pay if the apportionment was made on a wheelage basis, as provided in the contract.

This defendant further says that it is not able to state the precise amount of this overcharge, for the reason that the Indianapolis Union Railway Company refuses to give the necessary information as to the number of cars of other companies entering the station, but that said overcharge it believes will amount to over $200.00 a month, which overcharge has ben paid under protest, reserving all rights.

This defendant further says that the use which it makes of the property of the Indianapolis Union Railway Company is not materially different from that made by other companies which are treated as one company, and only required to pay one share of the rental. This defendant says that the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, one of the petitioners herein, has trains which come to Indianapolis from Cincinnati and go out to Chicago, which trains are treated as only constituting one com- [fol. 127] pany using the station property, for the purpose of apportioning the rental.

This defendant also says that the Peoria and Eastern Railway Company enters said sation from the east and goes out to the west in substantially the same way as this defendant, and is only required to pay one share of the rental.

Wherefore, this defendant prays that the petitioners herein be required to furnish the necessary information to determine the amount of the overcharge resulting from the improper apportionment of the expenses of the Union Station and that a master be appointed to ascertain the amount of said overcharge, and that petitioners herein be required to credit this defendant with such amount in its account and that the petitioners herein be required to give to this defendant all the rights conferred by the contract of 1883, upon paying only

one share of the rental provided in the said contract, and that the petitioners herein be restrained from making any charges for rental against this defendant beyond such charges as might be made against it as a single company liable for one share of the rental provided for in the contract of 1883, and that these petitioners in so far as they may have any claims under the contract of 1883, as signed by the Indianapolis, Decatur and Springfield Railway Company, may be marshalled as general creditors of the Cincinnati, Indianapolis and Western Railway Company, and entitled to such relief as may be given general creditors of that company for breach of contracts made by that company, and this defendant further prays that it be allowed its costs and all other proper relief.

Morison R. Waite, Harvey J. Elam, Solicitors for the Cincinnati, Indianapolis and Western Railroad Company.

[fol. 128] MOTION OF THE INDIANAPOLIS UNION RAILWAY COMPANY ET AL. TO STRIKE OUT THE ANSWER AND TO STRIKE OUT FROM THE ANSWER OF CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY FILED MARCH 20, 1918—Filed April 7, 1919

The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and The Vandalia Railroad Company, petitioners, by leave obtained in open court, for good cause shown, on the first day of April, 1919, to plead herein on or before April 8, 1919, and each of them, move the court to strike out the answer of the Cincinnati, Indianapolis & Western Railroad Company filed herein March 20, 1918, on the grounds:

1. The averments of said answer are insufficient to constitute a defense to the cause of action stated in the petition.

2. The issues attempted to be raised by said answer have been passed on and adjudicated in favor of petitioners by the order of the court overruling motion of said Cincinnati, Indianapolis & Western Railroad Company to dismiss the petition, entered March 2nd, 1918, and the opinion thereon filed January 9, 1918.

3. The averments of said answer purporting to state a counterclaim based upon alleged overcharges collected by petitioner, the Indianapolis Union Railway Company, from defendant, are insufficient to state a cause of action, for the reasons, among others, that said alleged overcharges, if any there were, appear from said answer to have been paid under an alleged mistake of law; and because the provisions contained in paragraph 15 of said agreement of September 20, 1883 in respect to arbitration and the conclusiveness of arbitration are applicable to said alleged claim of overcharge; and because said matters and things are not germane to the cause of action stated in the petition and cannot be adjudicated in this cause.

And in the alternative and if the court should deny said motion, your petitioners move the court to strike out from the answer all the averments thereof except the averments purporting to state a counter-claim based upon alleged overcharges and except the words on page 6 thereof reading as follows:

[fol. 129] "This defendant further says that at the time said foreclosure was made, there was not in force any other mortgage on the property conveyed which covered or included either contract with the Indianapolis Union Railway Company, and that at the time of said sale there were no mortgagees having any interest in either of said contracts with the Indianapolis Union Railway Company, except the mortgagees in the two mortgages being foreclosed,"

on the ground that the same do not constitute a defense nor any part of a defense; that they consist of arguments and legal conclusions; that they are not responsive to any averments of the petition; and that the issues attempted to be raised have been passed on and adjudicated by the order of the court overruling the motion of defendant to dismiss the petition, entered March 2, 1918; and petitioners move the court separately to strike out the averments purporting to state a counter-claim based upon said alleged overcharges, on the grounds stated in the foregoing part of the motion.

The Indianapolis Union Railway Co., by Baker & Daniels, Its Attorneys. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by L. J. Hackney. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by Maxwell & Ramsey, Attorneys. Vandalia Railroad Company, by Maxwell & Rausey, Attorneys.

[fol. 130] OPINION ON MOTION OF INDIANAPOLIS UNION RAILWAY COMPANY ET AL. TO STRIKE FROM THE FILES THE ANSWER OF CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY FILED MARCH 20, 1918, OR, IN THE ALTERNATIVE, TO STRIKE CERTAIN AVERMENTS THEREFROM—Filed May 27, 1919

Heard on motion of Indianapolis Union Railway Company, and other petitioners, to strike from the files the answer of Cincinnati, Indianapolis & Western Railroad Company filed March 20, 1918, or, in the alternative, to strike certain averments therefrom.

Even if the motion to strike from the files were well taken on the first and second grounds of the motion, or either of them, the motion cannot prevail, because the answer contains averments in the nature of a counter-claim of a character not subject to arbitration under Paragraph 15 of the agreement of September 20, 1883, and not, when properly considered, an averment of a mistake of law.

The wheelage basis on which the expenses of the Union Station were to be apportioned among the various railroads using the station

was undoubtedly well understood at the time the contract was made, and the contract needs no interpretation. If it be assumed that the court cannot take judicial notice of the meaning of "wheelage basis," that term, as understood by railroad men, can be easily proved.

Wheelage basis is a fact. The substance of the charge in the counterclaim is that the defendant is charged on a basis different from the basis agreed on.

Inasmuch as defendant's rights with respect to this charge and the rental to be paid grow out of the same contract, and the defendant avers its want of knowledge of the state of the account between it and the Union Railway Company, and the possession of such information by the Union Company and the refusal of the Union Company to furnish the information, it would seem, and is held, that under the broad construction of Equity Rule 30, together with Rules 23 and 26 (Hopkins Equity Rules, 2nd Ed., 189, 190), defendant's averments in the nature of a counterclaim make a case, under the circumstances, sufficient for consideration by a court of equity.

The motion to strike the answer from the files will be overruled.

[fol. 131] The motion to strike from the answer will be granted.

Whatever the decrees of sale may say, and whatever construction the defendant puts upon them, the fact remains that the defendant bought the two contracts as a part of the assets of its predecessor.

If it be granted that under the power of election the purchaser could reject either one or the other, or both, of those contracts, it must, if it rejects either, reject it wholly; that is to say, it cannot reject that part of the contract which it considers detrimental to its interests, and at the same time hold to that part of it which it regards as beneficial.

Apparently, the purchaser rejected the entire Indianapolis, Decatur & Springfield contract, but in reality it has not done so. The successor of the Cincinnati, Indianapolis and Western Railway continues to run its trains from the west into Indianapolis, and from Indianapolis to the west, in exactly the same way as its predecessor, paying two rentals, used them. Since there is no change in use, why should there be a change in payment for the same use? The Union Railway's facilities are still subjected by defendant to its requirements for east-bound trains into Indianapolis and west-bound trains out of Indianapolis. If it will give up the use contemplated by the contract, it will then be relieved from the payment required by the contract. It cannot accept the benefits without the responsibilities; and it is quite certain that there is nothing in the decrees which was intended to give the purchaser or his assignee the right to reject the contract and at the same time retain the benefits of it. Whatever its written notice of rejection may say, its conduct shows that it has elected to reject only its responsibilities under the contract. This cannot be right.

It is true that in the opinion filed on the motion to dismiss the bill the court assumed the existence of facts which were not in existence, but the conclusions from them were only by way of additional reason why the court was of opinion that the defendant could

not elect to reject a contract and still retain its beneficial interest in it.

The facts rebut any suggestion of laches or of estoppel in pais. The position of the defendant has not only not been acquiesced in at any time, so far as the court can see, by the Indianapolis Union Railway Company or the other petitioners, but the defendant knew ever since the first payment of rental was due after the sale that the Union Railway Company was demanding two rentals. The defend-
[fol. 132] ant has not been thrown off its guard, or deceived or misled in any way. It made its large expenditures on its own risk.

The bringing of this suit October 24, 1916, was not an unreasonable delay.

If it is assumed that the Indianapolis Union Railway Company in any way represented the other petitioners in this suit when it filed its intervening petition at Indianapolis December 4, 1915, and here later in December claiming a lien on the property of the Cincinnati, Indianapolis and Western Railway Company for expenses incurred in elevating the tracks of that railway company, yet the Union Railway Company and the other petitioners were not parties to the foreclosure proceedings with respect to any other issue than that presented by that intervening petition. But, if these petitioners were in fact parties in the foreclosure proce-ding, th-re is still no reason why the purchaser or its asignee, the defendant, should use the same facilities their predecessor used without paying for them as their predecessor did, and was bound to do.

Order accordingly.

Hollister, Judge.

For plaintiffs: Baker & Daniels, L. J. Hackney, Maxwell & Ramsey.

For defendant: Harvey J. Elam, Morison R. Waite.

ORDER ON MOTION TO STRIKE OUT—Filed June 30, 1919

Come now the petitioners, the Indianapolis Union Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Com-
[fol. 133] pany and the Vandalia Railroad Company, by counsel, and comes also the defendant, Cincinnati, Indianapolis & Western Railroad Company, by counsel, and this case is submitted to the court upon the motion of the petitioners, filed April 8, 1919, to strike out the answer and to strike out from the answer of defendant, filed March 20, 1918; the arguments of counsel are heard and briefs submitted; and the court, being fully advised in the premises, finds that the motions of the petitioners to strike out the answer of the defendant should be overruled, and that the motion of the petitioners to strike out from the answer of the defendant should be sustained; and thereupon, it is by the court ordered, adjudged and decreed that the motion of the petitioners to strike out the answer

of the def-ndant be, and the same is hereby overruled to which ruling and action of the court the petitioners now duly except; and it is further by the court ordered, adjudged and decreed that the motion of the petitioners to strike out from the answer of the defendant be, and the same is hereby sustained and that all of the answer of the defendant herein be stricken out except the parts thereof on page 6 reading as follows:

"This defendant further says that at the time said foreclosure was made, there was not in force any other mortgage on the property conveyed which covered or included either contract with the Indianapolis Union Railway Company, and that at the time of said sale there were no mortgagees having any interest in either of said contracts with the Indianapolis Union Railway Company, except the mortgagees in the two mortgages being foreclosed;"

and except also the part thereof on page 14 reading as follows:

"This defendant further says that the said company (namely, the Indianapolis Union Railway Company) has been charging this defendant excessively for the use of the Union Station in the following way: The contract of 1883 in its eighth paragraph provides that the expenses at the Union Station shall be apportioned and paid on a wheelage basis, additional to the rental charge, so, as aforesaid, in controversy; that when said contract is properly construed, the charges at the Union Station should be apportioned among the various railroad companies using said station, on the basis of the number of cars entering and leaving said station.

This defendant further says that the Indianapolis Union Railway Company has not been apportioning the expenses among the various [fols. 134 & 135] companies using said station, on a wheelage basis, but has been apportioning said expenses on the basis of the number of trains using said station; that other companies making use of said station run many long trains, including trains of nine or ten cars; that this defendant for the most part, handles short trains of three or four cars each, and that for that reason the method of apportioning the expenses followed by the Indianapolis Union Railway Company works to the injury of this defendant, and requires it to pay more for the use of the Union Station than it would have to pay if the apportionment was made on a wheelage basis, as provided in the contract.

This defendant further says that it is not able to state the precise amount of this overcharge, for the reason that the Indianapolis Union Railway Company refuses to give the necessary information as to the number of cars of other companies entering the station, but that said overcharge it believes will amount to over $200.00 a month, which overcharge has been paid under protest, reserving all rights;"

and except also the part thereof on pages 15 and 16 reading as follows:

"Wherefore, this defendant prays that the petitioners herein be required to furnish the necessary information to determine the

amount of the overcharge resulting from the improper apportionment of the expenses of the Union Station, and that a master be appointed to ascertain the amount of said overcharge, and that petitioners herein be required to credit this defendant with such amount in its account * * * and this defendant further prays that it be allowed its costs and all other proper relief;"

and the petitioners and each of them except to the overruling of their motion to strike out the answer, and defendant excepts to the sustaining of petitioners' motion to strike out from the answer, and the order of the court so striking out parts of its answer and petitioners are granted 15 days within which to reply.

Hollister, Judge.

[fol. 136] MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER ATTACHED—Filed April 6, 1920

The Cincinnati, Indianapolis and Western Railroad Company herein called defendant moves the Court for leave to amend and supplement its answer by filing an amended and supplemental answer to the petition filed by The Indianapolis Union Railroad Company et al., in the above entitled causes on October 24, 1916. A copy of said prepared answer is attached hereto, and sets up facts additional to those contained in the answer now on file, and defendant says that some of said facts have only come to the knowledge of solicitors of the defendant, and some of said facts have only happened, since the filing of its answer now on file, and said amendment also sets up additional facts which defendant's solicitors now believe material for the court to have before it in arriving at complete justice between the parties and which have apparently been heretofore unknown to the court, that the construction placed on the contract by the court in its last opinion came as a surprise to defendant's solicitors and suggested a line of investigation not theretofore deemed essential by de-
[fol. 137] fendant's solicitors and that defendant's solicitors believe that justice requires that the amendment be permitted.

Wherefore the defendant asks leave to file its amended and supplemental answer.

The Cincinnati, Indianapolis and Western Railroad Company, by Morison R. Waite, by Harvey J. Elam, Solicitors.

AMENDED AND SUPPLEMENTAL ANSWER OF CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY TO PETITION—Filed October 24, 1916

The Cincinnati, Indianapolis and Western Railroad Company by leave of Court for amended and supplemental answer to the petition filed by the Indianapolis Union Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company and the Van-

dalia Railroad Company in the above entitled cause, on October 24th, 1916, says: That it has already tendered or paid the Indianapolis Union Railway Company more than it owes said company, and that the other petitioners herein have no rights to any payments whatever except as they may each ultimately receive a portion of the payments due primarily to the Indianapolis Union Railway Company.

And the Cincinnati, Indianapolis and Western Railroad Company, hereinafter termed the defendant, further answering said petition says that it is a corporation formed under the laws of Indiana and no other state; that the Indianapolis Union Railway Company was formed in the year 1883, and that the railroads interested therein entered into the contract set forth in the petition as the contract of [fol. 138] 1883; that at that time the Indianapolis, Decatur and Springfield Railway Company was a line of railroad extending from Indianapolis westward to Decatur, Illinois, and other points, and that at that time the Cincinnati, Hamilton and Indianapolis Railroad Company was a line of railroad extending from Indianapolis eastward to the city of Rushville, Indiana, and other cities; that the Indianapolis, Decatur and Springfield Railway Company signed the contract of 1883 above referred to, in about the year 1883, and that shortly thereafter the Indianapolis, Decatur and Springfield Railway Company was succeeded by the Indiana, Decatur and Western Railway Company; that said company in the bill of complaint is incorrectly called the Indianapolis, Decatur and Western Railway Company; that said Indiana, Decatur and Western Railway Company succeeded to all the rights and obligations of said Indianapolis, Decatur and Springfield Railway Company under said contract of 1883; that this company is not informed as to the precise way in which the contract of 1883 was signed by the various companies, and prays that the petitioners be required to make proof thereof, if the Court deems any greater detail necessary in this matter than is admitted by this answer.

This defendant further says that the contract of 1883 was signed by either the Cincinnati, Hamilton and Dayton Railway Company or by the Cincinnati, Hamilton and Indianapolis Railroad Company; that this defendant has no information as to which company originally signed said contract, and prays that as to this, the plaintiffs be required to make their proof, but this defendant does say that thereafter the Cincinnati, Hamilton and Indianapolis Railroad Company, either in its own right or as the successor of the Cincinnati, Hamilton and Dayton Railway Company, assumed the obligations and acquired the rights conferred by the aforesaid contract of 1883, and that in the year 1902 the Cincinnati, Hamilton and Indianapolis Railroad Company was making the payments required under said contract and in general exercising the rights therein granted, and that in that year the Indiana, Decatur and Western Railway Company was also in general exercising the rights and making the payments required of a signer of said contract of 1883; that under said contract any railroad company which was a party to the contract of 1883, was entitled to the use of the entire property of the Indianapolis Union Railway Company and the Belt Railroad Company, and

entitled to operate trains over any tracks owned or controlled by said [fol. 139] Indianapolis Union Railway Company; that in the year 1902, the Cincinnati, Indianapolis and Western Railway Company was formed by the consolidation of the Cincinnati, Hamilton and Indianapolis Railroad Company and the Indiana, Decatur and Western Railway Company; that no receiver for said company was ever appointed; that thereafter the Cincinnati, Indianapolis and Western Railway Company or its agents, continued to carry out each of the contracts for the use of the facilities of said Indianapolis Union Railway Company in so far as they conferred rights and obligations upon its constituent companies, to-wit: the contract made by the Cincinnati, Hamilton and Indianapolis Railroad Company or made by the Cincinnati, Hamilton and Dayton Railroad Company and adopted by the Cincinnati, Hamilton and Indianapolis Railroad Company, and the contract made by the Indianapolis, Decatur and Springfield Railway Company, and adopted by the Indiana, Decatur and Western Railway Company, except that said Cincinnati, Indianapolis and Western Railway Company was in fact overcharged in some particulars, one of which is hereinafter mentioned, and that from the years 1902 to 1915, the Cincinnati, Indianapolis and Western Railway Company was a single corporation, which owned and was obligated to perform and did perform two contracts with the Indianapolis Union Railway Company in accordance with the agreement of 1883, by succeeding to the obligation of its constituent companies; that by virtue of such ownership, the Cincinnati, Indianapolis and Western Railway Company was given two votes on the Board of Managers of the Indianapolis Union Railway Company, and was also required to pay two portions of the rental charge just as if it had remained two companies; that the amendment to the contract of 1883 made in 1906 did not in any way alter this condition; that said amendment to said contract was not signed by the Cincinnati, Indianapolis & Western Railway Company as a single company, but two separate signatures were affixed to said contract—one as successor to the Cincinnati, Hamilton and Indianapolis Railroad Company, and another as successor to the Indiana, Decatur and Western Railway Company and at the time of said amendment and at all times in dealings by the parties interested therein, said contracts were treated as not merged but as two separate and distinct contracts; that prior to the formation of the Cincinnati, Indianapolis and Western Railway Company, the Indiana, Decatur and Western Railway Company had placed a mortgage on its property, which mortgage was placed in February of 1899, and a supplemental mort- [fol. 140] gage was made December 1st, 1901; that by said mortgage the Indiana, Decatur and Western Railway Company made all of its contracts, including the contract with the Indianapolis Union Railway Company, security for the bonds secured by said Mortgage; that among other contracts covered by this mortgage was the contract herein involved with the Indianapolis Union Railway Company, and that said mortgagee acquired an interest in said contract as a separate and distinct contract, which interest was in no way terminated by the subsequent consolidation with the Cincinnati, Hamilton and

Indianapolis Railway Company, and was a separate and distinct interest; that thereafter a general mortgage was placed upon the entire property of the Cincinnati, Indianapolis and Western Railway Company, and that each of said mortgages was thereafter defaulted and foreclosure proceedings had in this court; that in foreclosing said mortgages two separate suits were filed and two separate decrees were entered; that under these decrees of foreclosure, sale was ordered by this Court and sale was had under both decrees; that in the suit of Central Trust Company of New York against the Cincinnati, Indianapolis andWestern Railway Company, which was the suit to foreclose the mortgage of the Indiana, Decatur and Western Railway Company above referred to, this Court listed as property for sale under said foreclosure proceedings, the "contract dated September 20, 1883, and amendment of August 20th, 1908, under which, tracks of the Union Railway Company are occupied in Indianapolis;" that the contract so as aforesaid adopted by the Indiana, Decatur and Western Railway Company involved in this proceeding is the only contract in existence that answers this description and is the contract that was described; that at the time said decree was entered, the mortgagees had no interest in the property east of Indianapolis, and had no interest whatever in the contract of the Cincinnati, Hamilton and Indianapolis Railway Company, and that this Court by said order of sale expressly adjudicated and represented to purchasers that there had been no merger of contracts, and that the contract with the Indiana, Decatur and Western Railway Company was still a separate contract not merged with the contract of the Cincinnati, Hamilton and Indianapolis Railway Company, and that any other holding would have been greatly prejudicial to the mortgagees of the Indiana, Decatur and Western Railway Company, as the property covered by their mortgage could not have been burdened with amounts due under the Cincinnati, Hamilton and Indianapolis Rail-
[fol. 141] way Company contract without greatly impairing the value of the security.

This defendant further says that said two contracts have in fact at all times been construed by the parties thereto as two separate and distinct contracts in acting thereunder prior to this dispute, and not as merged contracts, and that there could be no liability for two rentals unless said contracts are still separate and not merged.

This defendant further says that when the Special Master prepared his deed under the foreclosure of the Indiana, Decatur and Western Railway Company mortgage, said Special Master expressly recited in said deed that he conveyed the contract with the Indianapolis Union Railway Company made by the Indiana, Decatur and Western Railway Company, and that the purchaser could take the same rights that said Indiana, Decatur and Western Railway Company took, and that in said deed said contract was treated as a separate and distinct contract; that said deed further recited that it was made subject to all the terms and reservations of each of said decrees of foreclosure and sale, whether in this indenture expressly referred to or not, which terms are hereinafter further stated.

This defendant further says that at the time said foreclosure was made, there was not in force any other mortgage on the property conveyed which covered or included either contract with the Indianapolis Union Railway Company, and that at the time of said sale there were no mortgagees having any interest in either of said contracts with the Indianapolis Union Railway Company, except the mortgagees in the two mortgages being foreclosed, and the orders of sale expressly recited that the property was sold free from the lien of any mortgage except that the decree foreclosing the general mortgage recited that that mortgage and that decree and foreclosure were subject to the lien of the Indiana, Decatur and Western mortgage, which was foreclosed at the same time but in another suit; that at the time the decrees of foreclosure in these cases were made in 1915, the Cincinnati, Indianapolis and Western Railway Company was paying two-thirteenths of the rental charge of the Union Station, or a little over fifteen per cent of the total rental charge; that this rental charge was a very great burden to the said company and amounted to approximately $29,000.00 a year; that at this time, and for a considerable period prior thereto, said Cincinnati, Indianapolis and Western Railway Company was only getting about five and seven-tenths per cent [fol. 142] of the use of the Union Railway Company property, figuring that use on wheelage basis; that at that time there were certain track elevation projects under way in the City of Indianapolis which would require the Indianapolis Union Railway Company to make very large additional investments, which would more than double the amount of rent to be paid after said projects were completed; that at that time the earnings from the operation of the Cincinnati, Indianapolis and Western Railway Company did not equal its expenses, and neither it nor a purchaser of the property was able to bear the burden imposed upon it by the two contracts of 1883, and that the property to be sold by this court in foreclosing the mortgages on the Cincinnati, Indianapolis and Western Railway Company would be much less valuable if the purchaser was required to take over all the contracts of the Cincinnati, Indianapolis and Western Railway Company; that this Court in recognition of this fact, inserted in Folio 54 of the decree of foreclosure in each case as printed and dated June 29th, 1915, the following provision:

"The purchaser and his successors or assigns shall have the right, for the period of thirty days after the delivery of the deed or instrument of transfer from the Special Master hereinafter provided for, to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company, or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this court within said period of thirty days."

That in the same decrees this Court found that certain mortgages covering the property of the Cincinnati, Indianapolis and Western Railway Company were valid and should be foreclosed, and in

each case a sale was decreed, all of which more fully appears from the records of this court; that thereafter separate sales were had of the property of the Cincinnati, Indianapolis and Western Railway Company under the decrees of foreclosure above described, and this defendant as assignee of the purchaser at each sale was delivered a separate deed to the property involved in each foreclosure, by the Special Master referred to in the decrees of foreclosure, on November 30th, 1915; that each of said deeds expressly recited that it was given "subject also to all the terms and reservations of each of said decrees of foreclosure and sale, whether in this indenture expressly [fol. 143] referred to or not;" that as above stated the purchaser was thus given thirty days within which to determine the extent to which it would accept said deed; that thereafter within thirty (30) days, on approximately December 24th, 1915, the exact date being matter of record in this court, this defendant filed with the Clerk of this court its written election in each foreclosure suit not to assume or adopt the contract of the Indianapolis Union Railway Company formerly made with the Indianapolis, Decatur and Springfield Railway Company; that said notice in the suit of the Equitable Trust Company contained among other things, the following language:

"Please take notice that The Cincinnati, Indianapolis and Western Railroad Company is the assignee of all property sold at the foreclosure sale in this cause and is now the owner of said property by virtue of deeds signed by Noble C. Butler, Special Master herein, and Frederick N. Ecker who acted in this matter as a purchasing committee, and others, and said The Cincinnati, Indianapolis and Western Railroad Company in exercise of the rights granted to such purchaser and his successors or assigns by the foreclosure decree heretofore entered in this court, does hereby elect not to assume or adopt each of the following contracts: * * * Third. Contract dated September 20th, 1883, and amendment of August 20th, 1908, under which tracks of the Union Railway Company are occupied in Indianapolis, in so far as such rights are conferred by the signature of the Indianapolis, Decatur and Springfield Railway Company to said contract. This assignee hereby expressly accepts such contract as made with the Cincinnati, Hamilton & Indianapolis Railroad Company, and desires to accept the benefits of the contract with said Company, and the right to occupy the tracks of the Union Railway Company, and the Belt Railway Company therein conferred. The contract referred to at No. 14 of VII of the original foreclosure decree is in fact two contracts, which were each owned by the Cincinnati, Indianapolis & Western Railway Company at the time of this foreclosure decree, by virtue of being a consolidated corporation which had succeeded to and become bound by contracts of both the Indianapolis, Decatur & Springfield Railway Company and also the Cincinnati, Hamilton & Indianapolis Railroad Company. The Cincinnati, Indianapolis & Western Railroad Company therefore now elects not to assume or adopt any obligations imposed by the contract with the Indianapolis, Decatur & Springfield Railway Company * * *."

[fol. 144] That the notice in the Central Trust Company suit contained substantially the same language except that the contract was described as referred to at No. 11 of VI of the original decree; that by these notices this defendant rejected the contract made with the Indianapolis, Decatur and Springfield Railway Company; that said contract so rejected had been expressly represented to the public and this purchaser as an independent contract in the foreclosure of the Indiana, Decatur and Western Railway Company mortgage, and the contract described in the rejection notice was the contract involved in the petition to which this is an answer; that a similar election was filed in each of the ancillary jurisdictions, within thirty days from the receipt of the deed above referred to, and each of said elections was filed about December 24th, 1915; that thereafter this defendant entered upon the operation of the line of railroad formerly owned by the Cincinnati, Indianapolis and Western Railway Company and purchased at the foreclosure sale of this Court; that thereafter this defendant consistently maintained that it was a single railroad company possessing a single contract with the Indianapolis Union Railway Company, entitled to a single vote in the Board of Managers, and entitled to be charged only one share of the rental of the Union Railway property under the contract of 1883 and by letter mailed December 24th, 1915, expressly notified the Union Railway Company that no rights were claimed under the Indiana, Decatur and Western contract; that this defendant has in fact never claimed any rights under that contract; that at the time this defendant entered upon the operation of the property aforesaid, the rental charge under the contract of 1883 was divided into thirteen parts; that this defendant has maintained that it should be counted as one railroad and not as two railroads, and that said rental should be apportioned into twelve shares, of which this defendant should pay but one and this defendant further says that it has uniformly tendered at the time due, the amount of rental due from it figured on this basis, and that it now stands ready to pay all rental due when properly so figured, and has repeatedly tendered said amounts, which tenders have been refused.

This defendant further says that if it is charged rental on the basis of one-twelfth of the total amount to be paid, it will pay more than its full share of the expenses of the Union Railway property; that the use it makes of said property on a wheelage basis is only about five to seven per cent of the total use of the property; that if it pays one-twelfth of the rental it will pay over eight per cent [fol. 145] of the total rental of said property, and if forced to pay two-thirteenths it will pay over fifteen per cent of the total paid, and more than twice its per cent of use.

This defendant further says that its total passenger earnings out of the City of Indianapolis, including passengers to and from that station, has only been about $172,000.00 per year; that the demand now made by the petitioners herein, is that this defendant pay for the rental of the terminal facilities at Indianapolis to the Indianapolis Union Railway Company, in addition to all other charges, an amount which is already about $18,000.00 a year; and which when

the track elevation work, now planned is completed, will amount to about $40,000.00 a year, and that the total rental charge against this company for use of the terminal facilities at Indianapolis based on two-thirteenths would then amount to approximately $80,000.00 per year, and the total charge for use of the Indianapolis Union Railroad property, including taxes and operating expenses would be about $125,000.00 per year; that said charges are wholly unreasonable and out of all proportion to any possible earnings of this company in said terminal facilities, and that if this defendant is required to meet such charges by this court, this court will thereby take a very substantial portion of the value out of the property sold by this court in its foreclosure proceedings, and out of the property which, under the decree of this court, this defendant purchased, and will modify the contract of sale in a very important particular, and that this court and its master has not offered to return the purchase money or any portion thereof, and no effort has been made to in any way rescind the contract of purchase.

That Section 12 of the contract expressly provides that each company shall receive equal and impartial privileges in the use of said joint property; that under Section 13 and Section 14 the contract provides that its benefits are extended to the particular companies who sign the contract and that there is no where in the contract any restriction upon the use to be made of the Union Railway property by the various participating companies and that in fact the contract has been in practice construed by the parties as imposing no such limitations and the only effect of increasing the use is to increase the proportion of the operating expense paid by a given company; that the Cleveland, Cincinnati, Chicago and St. Louis Railway Company now operates trains over its Peoria & Eastern division from Peoria, Illinois, to Springfield, Ohio, upon the basis of paying one rental; that the track from Peoria to Indianapolis, which is now part [fol. 146] of the Peoria & Eastern division of the Big Four, was, at the time of the signing of the contract now in suit, the property of the Indiana, Bloomington and Western Railway Company, which was one of the signers of the contract here in suit, and that thereafter said company, or its successor, constructed an additional line of railroad to the East to Springfield, Ohio, and claimed and exercised the right to use the Indianapolis Union Railway property by virtue of the signature of the Indiana, Bloomington and Western Railway Company for trains from the East as well as trains from the West, and that the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, one of the complainants herein has also maintained said right; that at the time of filing the petition to which this answer is addressed, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company operated trains into the Indianapolis Union Railway Station from Louisville and also from Richmond, Indiana, and also from Chicago; that said trains from Chicago constituted a distinct branch of the system of this petitioner but that no rental was paid on account of said trains, but that said trains were operated by virtue of the membership of the Chicago, St. Louis and Pittsburgh Railroad Company, one of the original parties to the agreement.

and that at the time the original contract was signed, no such trains were operated and that this operation was an addition to any operation carried on by this complainant, or any of its predecessors, at the time the contract was signed; that since this proceeding was started the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company and the Vandalia Railroad Company have become consolidated and that a new line of railroad has been constructed called the Indianapolis and Frankfort Railroad Company, which joins the tracks formerly owned by the Vandalia Railroad Company at a point about four miles West of the Indianapolis Union Station; that prior to the construction of said railroad, said trains from Chicago entered the Union Station from the East under a trackage right over the Lake Erie and Western Railroad Company, but that now they enter the Station from the West over the tracks formerly owned by the Vandalia, and that still no share of the rental is paid on account of said trains; that at the time the contract in suit was signed by the Indianapolis, Decatur and Springfield Railway Company, said Company did not operate trains beyond Decatur, Illinois, but that the successors of said Company later extended such operation to Springfield, Illinois, and that there was no change in the rental on account of the increased operation; that trains also enter and leave [fol. 147] the tracks of the Indianapolis Union Railway Company over any routes that become desirable in operation and that this defendant brings its trains from the West to the Indianapolis Union Station over tracks of the Big Four and that the operation by the various parties to the agreement has never been confined to any particular tracks or routes; that in addition to the trains operated, as above mentioned, for many years, it has been the practice of the various companies to haul through cars from the Union Station over routes not in use or contemplated at the time the original contract was signed; that the Vandalia Railroad Company, or its successor, has operated through cars, leaving Indianapolis for Evansville, and also for French Lick, which are points not on the Vandalia line; and that the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company has continuously operated through sleepers to Louisville, Kentucky, and Toledo, Ohio; and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company has operated through sleepers to Traverse City and points in Michigan, and that any company's sleepers so operated run to points which were not reached by the company so operating them at the time the contract here involved was signed; that the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company also only pays one rental for trains operated through Indianapolis between Cincinnati and Chicago; that all of said operation has been accepted as proper by all parties to the contract and that when this defendant undertook to operate trains from Indianapolis to Springfield, Illinois, by virtue of its rights as successor of the Cincinnati, Hamilton and Indianapolis Railroad Company, the right claimed was identical with rights which had been continuously exercised by the petitioners herein for many years and was in accord with the terms of the contract in suit as said contract had been construed by consent of all parties thereto for many years

and was a right which could lawfully be exercised by the lawful successor of the Cincinnati, Hamilton and Indianapolis Railroad Company, and that the parties, by many years' acquiescence on such a construction of the contract have established this construction as justifying such operation, and that such operation by this defendant was entirely consistent with its action in rejecting the contract of the Indianapolis, Decatur and Springfield Railway Company, and said contract should be construed the same as to all parties.

That the complainants are all represented by the Indianapolis Union Railway Company for the purpose of the contentions raised [fol. 148] in this suit, and that said company and all the complainants are now estopped to present the claim herein involved, and have forfeited all rights to present their petition, for the following reason:

This court in its order of sale expressly gave the defendant the right to refuse to accept any contract which it saw fit, all of which is hereinabove set out.

That in accordance with said provision, on about December 24th, 1915, and within the thirty days allowed by the order of sale, this defendant duly elected not to accept or adopt the contract made with the Indianapolis Union Railway Company by the Indianapolis, Decatur and Springfield Railway Company, all of which is fully stated above; that this defendant also wrote to the Indianapolis Union Railway Company a letter, which said company duly received within thirty days, and acknowledged, wherein this defendant set forth in detail its position and asserted that it was only liable to pay one share of the rental; that in addition, on about December 4th, 1915, the Indianapolis Union Railway Company filed another intervening petition in each of said foreclosure suits involved in this controversy, and in each of said foreclosure suits sought to establish a lien on the funds produced by the sale of the property to this defendant; that by the terms of the sale, the property purchased by this defendant was only a part of the property owned by the Cincinnati, Indianapolis and Western Railway Company; that by filing said intervening petition the Indianapolis Union Railway Company elected to ratify and in all things approve said sale and the terms thereof, and asked to be allowed a portion of the proceeds of said sale, and did not ask that the order of sale be in any way modified, vacated or set aside; that thereafter this defendant continued to operate said property, and in the course of operating said property after taking possession thereof, expended over $120,000.00 in the repair of bridges, and over $55,000.00 in repairing and improving certain shops on the property, and also expended over $227,000.00 in repairing box cars, and expended approximately $650,000.00 in buying new cars and approximately $560,000.00 in buying new engines, all of which equipment was purchased and obtained for the purpose of operating the property purchased at the sale conducted by this court, and that said sum was practically all expended during the spring of 1916, and was all expended prior to

October 24th, 1916, the date on which the petition now before the court was filed.

This defendant further says that the Indianapolis Union Rail- [fol. 149] way Company by its petition filed December 4th 1915, then became a party to proceedings in connection with said sale, and was a party thereto continuously to the present time, beginning at a date prior to the filing of the rejection notices, and that on December 4th, 1915, it became chargeable with knowledge of the terms of said sale, and that said Indianapolis Union Railway Company in fact, during the month of December, 1915, was given actual information as to the terms of sale so far as the contracts here involved were concerned, and was given notice of the construction of the contract of sale adopted by this defendant; that thereafter said intervening company failed to file any other additional petition, or take any steps whatever in any court to question the construction as adopted, until this petition was filed; that said intervenor also had knowledge that this defendant had expended large sums in rehabilitating and operating the property purchased, and in fact handled through its station large numbers of the new engines and cars purchased, and had general knowledge that large amounts were being expended along the road; that notwithstanding such knowledge and information, this intervenor allowed this defendant to proceed with such expenditures without objection and also allowed this court to distribute the money received from such sale and thereby put the parties to such sale in such position that it was impossible to rescind the sale and place the parties in statu quo; that in addition a contract of settlement was made as appears from the records of this court after the intervening petition now under consideration was filed, wherein the Indianapolis Union Railway Company accepted the benefit of $2,500 of the proceeds of said sale in settlement of the questions raised in the petition filed December 4th, 1915; that the present petition is an effort upon the part of the intervening petitioners to have this court modify the terms of sale under which the property was purchased and under which said money was paid, and that this court has no right to so modify the terms of sale without first tendering back the money received, and placing the parties in as good a position as they were before the sale; that this petitioner has rendered this impossible and thereby estopped itself from further proceeding with this petition, and by its laches and delay in presenting the contentions now advanced, and by accepting part of the proceds of sale and thereby electing to ratify the sale, the petitioners herein have placed themselves in such a position that they are not entitled to proceed with this petition.

This defendant further says that in addition to the improper de- [fol. 150] mands of the Union Railway Company above described, the said company has also been charging this defendant excessively for the use of the Union Station in the following way: The contract of 1883 in its eighth paragraph provides that the expenses at the Union Station shall be apportioned and paid on a wheelage basis, additional to the rental charge, so, as aforesaid, in controversy; that when said contract is properly construed, the charge at the Union

Station should be apportioned among the various railroad companies using said station, on the basis of the number of cars entering and leaving said station.

This defendant further says that the Indianapolis Union Railway Company has not been apportioning the expenses among the various companies using said station, on a wheelage basis, but has been apportioning said expenses on the basis of the number of trains using said station; that other companies making use of said station run many long trains, including trains of nine or ten cars; that this defendant for the most part, handles short trains of three or four cars each, and that for that reason the methol of apportioning the expenses followed by the Indianapolis Union Railway Company works to the injury of this defendant, and requires it to pay more for the use of the Union Station than it would have to pay if the apportionment was made on a wheelage basis, as provided in the contract.

This defendant further says that it is not able to state the precise amount of this overcharge, for the reason that the Indianapolis Union Railway Company refuses to give the necessary information as to the number of cars of other companies entering the station, but that said overcharge it believes will amount to over $300 a month, which overcharge has been paid under protest, reserving all rights, and was paid under compulsion in that under the contract the Indianapolis Union Railway Company claimed the right to exclude this defendant from the use of the station and other property covered by the contract in case payment was not made.

This defendant also says that the Peoria and Eastern Railway Company enters said station from the east and goes out to the west in substantially the same way as this defendant, and is only required to pay one share of the rental.

Wherefore, this defendant prays that the petitioners herein be required to furnish the necessary information to determine the amount of the overcharge resulting from the improper apportion-[fol. 151] ment of the expenses of the Union Station, and that a master be appointed to ascertain the amount of the overcharge resulting from the improper apportionment of the expenses of the Union Station, and that a master be appointed to ascertain the amount of said overcharge, that said petitioners herein be required to credit this defendant with such amount in its account, and that the petitioners herein be required to give this defendant all the rights conferred by the contract of 1883, upon paying only one share of the rental provided in the said contract, and that the petitioners herein be restrained from making any charges for rental against this defendant beyond such charges as might be made against it as a single company liable for one share of the rental provided for in the contract of 1883, and that these petitioners in so far as they may have any claims under the contract of 1883, as signed by the Indianapolis, Decatur and Springfield Railway Company, may be marshalled as general creditors of the Cincinnati, Indianapolis and Western Railway Company, and entitled to such relief as may be given general creditors of that company for breach of contracts made by that company, and this de-

fendant further prays that it be allowed its costs and all other proper relief.

Morison R. Waite, Harvey J. Elam, Solicitors for the Cincinnati, Indianapolis and Western Railroad Company.

MEMORANDUM OPINION—Filed May 17, 1920

PECK, District Judge:

The motion for leave to file the amended and supplemental answer will be overruled, for the reasons heretofore stated, as to both jurisdiction and substance, in the opinions of Judge Hollister, upon the [fol. 152] motion to dismiss the bill and the motion to strike from the answer, and for the following reason:

As purchaser under the decree of foreclosure in the Central Trust Company case, the railroad company filed its rejection of the rights of the I. D. & W. Railway Company in the terminal. It attempted in that instrument of rejection to adopt the former rights of the C. H. & I. Railway Company therein, but that attempt was ineffectual, as those rights were not covered by the mortgage there in foreclosure; therefore, although the first mortgage on the I. D. & W. Railway might have kept that company's terminal agreement alive, as a separate contract, for the purposes of that indenture, yet the purchaser, by reason of the rejection aforesaid, took nothing thereby. This cause must then turn upon the effect of the purchaser's action in the Equitable Trust Company case.

The decree for sale declared "the following is a description of the mortgaged property hereinbefore and now directed to be sold * * * VII. * * * 14. Contract dated September 20, 1883, and amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis."

The occupants of the terminal all derive their rights from the contract mentioned, although they did not all become parties thereto at the same time; each of the two predecessors of the railway company was party thereto, and, by their merger into that company, it succeeded to their respective rights and obligations. Thus, whereas, theretofore, the contract had been with each of the two companies, it was, at the date of foreclosure with but one company. That company could not have declined performance of the obligations inherited from one ancestor in the contract and at the same time have insisted upon its rights derived from the other. The case is as though the railway company had been an original party to the contract with one railroad and one share of the obligation, and had later modified its contract by acquiring the rights and obligations pertaining to the ownership of two railroads.

Accordingly, there was but one contract sold, although the railway company was bound thereto as to each of the properties to which it had succeeded. While the purchaser had a right to reject or accept the same, it had to take or leave the obligation of the railway company to the terminal company in full and as it then existed

under the said contract. It did not have the right to restore the status which had existed when its two ancestors in title were severally [fol. 153] parties thereto, and elect to stand in the shoes of the one but not of the other. By those terms of the decree which prescribe the right of election it is stated that the purchaser will not be held to have adopted a contract in respect to which he has filed a written rejection within thirty days; therefore, adoption is presumed unless rejection has been expressed. Here there was an attempt to adopt the rights of one ancestor in title as to this contract and to reject the rights of the other ancestor. Such was not the election required or permissible under the decree, and was ineffectual to operate as a rejection. The time alloted for the exercise of the option having long since elapsed, the purchaser must be assumed to have adopted.

Maxwell & Ramsey, for Plaintiffs. Harvey J. Elam, Morison R. Waite, for Defendant.

[fol.154] ORDER OVERRULING MOTION OF CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY FOR LEAVE TO AMEND ANSWER—Filed June 26, 1920

This cause coming on to be heard on the motion of the Cincinnati, Indianapolis & Western Railroad Company for leave to file an amended and supplemental answer to the petition of the Indianapolis Union Railroad Company et al., filed October 24, 1918, said motion being entitled "Motion for Leave to Amend Answer," was argued by counsel and submitted to the court. Upon consideration whereof the court finds said motion not well taken and overrules the same to which said Cincinnati, Indianapolis & Western Railroad Company excepts.

Peck, Judge.

[fol. 155] ORDER—Filed July 6, 1920

Upon motion of the Indianapolis Union Railway Company, et al., petitioners, in open court, and for good cause shown, petitioners are hereby granted leave to amend the petitions to conform to the facts so as to show that the contract of September 20, 1883, was signed by The Cincinnati, Hamilton & Indianapolis Railroad Company and not by The Cincinnati, Hamilton & Dayton Railway Company, as alleged in the petitions.

Peck, Judge.

ORDER UPON THE PETITION OF INDIANAPOLIS UNION RAILWAY CO. ET AL. VS. THE CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY—Filed July 6, 1920

This cause came on to be heard on the motion of the Indianapolis Union Railway Company, the Cleveland, Cincinnati, Chicago & St.

Louis Railway Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and the Vandalia Railroad Company, for leave to withdraw their answer, filed July 23, 1919, to the counterclaim of The Cincinnati, Indianapolis & Western Railroad Company, contained in its answer filed March 20, 1918, to the petition, and upon the motion of said petitioners for a rehearing of their motion of April 8, 1919, to strike out said answer of said The Cincinnati, Indianapolis & Western Railroad Company; and thereupon in open court The Cincinnati, Indianapolis & Western Railroad Company by its counsel offers to withdraw the counterclaim of The Cincinnati, Indianapolis & Western Railroad Company contained in its answer to the petition filed March 20, 1918, being all those por- [fol. 156] tions of said answer on page 14 thereof set forth in the order of June 30, 1919, as a matter which the court by said order refused to strike from the answer, and the following matter contained in said answer, to-wit:

"Wherefore, this defendant prays that the petitioners herein be required to furnish the necessary information to determine the amount of the overcharge resulting from the improper apportionment of the expenses of the Union Station, and that a master be appointed to ascertain the amount of said overcharge, and that petitioners herein be required to credit this defendant with such amount on its account,"

and thereupon by consent of the parties the aforementioned portions of the answer, so offered to be withdrawn by The Cincinnati, Indianapolis & Western Railroad Company, are hereby withdrawn, without prejudice to the right of said The Cincinnati, Indianapolis & Western Railroad Company to reassert said matters so set up as a counterclaim.

Whereupon the petitioners by their counsel in open court and by consent of the parties and leave of court, withdraw their answer filed July 23, 1919, to the counter-claim of The Cincinnati, Indianapolis & Western Railroad Company, and their motion filed June 17, 1920, for leave to withdraw their answer to the counterclaim and for rehearing of their motion to strike out the answer of The Cincinnati, Indianapolis & Western Railroad Company. And said The Cincinnati, Indianapolis & Western Railroad Company not desiring to plead further, elects to stand upon its exceptions heretofore taken to the orders of the court entered herein. And the court finds, upon the petition and said election of The Cincinnati, Indianapolis & Western Railroad Company not to plead further, that the facts stated in the petition are true and that the equities of the case are with said petitioners and that under the decree in foreclosure and the election with reference to the contract of September 20, 1883, as amended August 20, 1906, filed by the purchaser pursuant to said decree in the cause in this court entitled The Central Trust Co. of New York et al. vs. Cincinnati, Indianapolis & Western Ry. Co. et al., In Equity, No. 51, the purchaser took neither rights nor obligations as to said contract.

The court further finds that the rights of the Cincinnati, Indianapolis & Western Railway Company in said contract were sold under the decree in this cause, in Equity, No. 50; that the same constituted but one contract, to which defendant, the Cincinnati, Indianapolis & Western Railway Company, was bound as to both the obli-
[fol. 157] gation flowing from the signature of The Indianapolis, Decatur & Springfield Railway Company and that flowing from the signature of The Cincinnati, Hamilton & Indianapolis Railroad Company; that the purchaser was bound to take or leave said contract in full, and did not have the right to reject the former obligation of the Indianapolis, Decatur & Springfield Railway Company and accept the rights and obligations of the Cincinnati, Hamilton & Indianapolis Railroad Company therein; that under the said decree in this cause the purchaser must be assumed to have adopted the obligations, unless the rejection permitted by said decree has been filed. The attempted rejection filed, to accept in part and reject in part the said obligation, was not permissible under said decree and was ineffectual; that accordingly under the decree the purchaser became bound by the said contract of September 20, 1883, as amended August 20, 1906, as to all the obligations incurred by the signatures of both the Indianapolis, Decatur & Springfield Railway Company and the Cincinnati, Hamilton & Indianapolis Railroad Company and it is ordered that the said decree and proceedings thereunder be and are so construed.

And this cause is referred to Oliver B. Jones, of Cincinnati, who is hereby appointed Special Master to determine and state the amount due to the date of his report from The Cincinnati, Indianapolis & Western Railroad Company to the Indianapolis Union Railway Company under and in accordance with the foregoing construction of the said decree and the proceedings thereunder, and who shall take such testimony as shall be produced before him by the parties and shall report to this court said testimony and his conclusions of law and fact therefrom.

To all of which findings and conclusions of the court and its order said The Cincinnati, Indianapolis and Western Railroad Company excepts.

Peck, J.

[fol. 158] FINAL DECREE—Filed December 17, 1920

This cause, on this 17th day of December, 1920, came on to be heard upon the report of the Special Master herein, filed September 23, 1920, and upon the exceptions of The Cincinnati, Indianapolis & Western Railroad Company, filed October 12, 1920, to the said report of the Special Master herein; and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed by the court that said exceptions of said The Cincinnati, Indianapolis & Western Railroad Company to said report of the Special Master be and they are hereby overruled, and said report of said Special Master be and it is hereby in all things approved and

confirmed. It is further, by the court, ordered, adjudged and decreed that the petitioner, the Indianapolis Union Railway Company, have and recover of and from said The Cincinnati, Indianapolis & Western Railroad Company the sum of $134,841.22 with interest in the sum of $19,114.88, in all $153,956.10, being the principal and interest of the two shares of fixed rental flowing from the signatures of both the Cincinnati, Hamilton & Indianapolis Railroad Company, and the Indianapolis, Decatur & Springfield Railway Company, up to September 1, 1920, as shown by the report of said Special Master, together with the costs of this proceeding. To all of which the defendant, The Cincinnati, Indianapolis & Western Railroad Company by its counsel excepts.

And now the petitioners and the defendant, The Cincinnati, Indianapolis & Western Railroad Company, in open court agree that inasmuch as $73,142.46 of the total sum of $153,956.10 so adjudged aga-nst the defendant, The Cincinnati, Indianapolis & Western Railroad Company (said sum of $73,142.46 being the principal amount that would be due on the obligation flowing from the signature of the Cincinnati, Hamilton & Indianapolis Railroad Company, provided there were no liability flowing from the signature of the Indianapolis, Decatur and Springfield Railway Company, and in consequence the fixed rental were divided among twelve instead of thirteen users) is not contested by The Cincinnati, Indianapolis & Western Railroad Company, and as to such sum said The Cincinnati, Indianapolis & Western Railroad Company makes no dispute, therefore, the parties, the Petitioners and the defendant, The Cincinnati, Indianapolis & Western Railroad Company, agree that said sum not in dispute may be paid by the defendant, Cincinnati, Indianapolis & [fol. 159] Western Railroad Company to the Indianapolis Union Railway Company and accepted by the Indianapolis Union Railway Company without prejudice, and that the proceedings in this cause, on appeal and otherwise, shall not in any way be affected or the rights of the petitioners or of the defendant, The Cincinnati, Indianapolis & Western Railroad Company, be prejudiced by such payment and acceptance, and accordingly under said agreement The Cincinnati, Indianapolis & Western Railroad Company paid to the petitioner, the Indianapolis Union Railway Company, in open court such sum not in dispute, viz: $73,142.46, thereby leaving unpaid of the total amount adjudged due as aforesaid the sum of $80,813.64, together with the costs of this proceeding, for which sum of $80,813.64 and costs, let execution issue.

To which award of execution the defendant, The Cincinnati, Indianapolis & Western Railroad Company, excepts.

Peck, United States District Judge.

December 17, 1920.

Petition of the Cincinnati, Indianapolis & Western Railroad Company for Appeal—Filed December 18, 1920

The intervenor herein, The Cincinnati, Indianapolis & Western Railroad Company, defendant in the intervening petition of The Indianapolis Union Railway Company et al., conceiving itself aggrieved by the final decree entered herein December 17, 1920, decreeing that it make paymnt to The Indianapolis Union Railway Company of the amount due on two shares of the fixed rental for the use of the latter's facilities, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit [fol. 160] for the reasons specified in the assignment of errors which is filed herewith.

Wherefore, said intervenor, The Cincinnati, Indianapolis & Western Railroad Company, prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree and order were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

J. J. Weiland, Waite, Schindel & Bayless, Solicitors for Defendant, The Cincinnati, Indianapolis & Western Railroad Company.

Assignment of Errors—Filed December 18, 1920

The intervenor, The Cincinnati, Indianapolis & Western Railroad Company, in connection with its petition for and appeal, says that the order and decree in this court are erroneous and makes the following assignment of errors, which it avers occurred in the trial of this cause and to which it objected and excepted at the time, to-wit:

1. The court erred in overruling the motion of The Cincinnati, Indianapolis & Western Railroad Company to dismiss the petition filed herein October 24, 1916, by the Indianapolis Union Railway Company and others.

2. The court erred in failing to hold that is was without jurisdiction in this court to make the order and grant the relief for which said petitioners prayed, or any part thereof.

3. The court erred in failing to hold that the facts alleged in said petition were insufficient to constitute a valid cause of action in equity against the said The Cincinnati, Indianapolis & Western Railroad Company.

4. The Court erred in its opinion filed January 9, 1916, in holding that there was a contract of the defendant, The Cincinnati, Indiana- [fol. 161] polis & Western Railway Company, with the Indianapolis Union Railway Company, which was a single obligation to pay two rentals.

5. The court erred in said opinion in holding that the purchaser took the entire contract of said defendant railway company or none of it.

6. The court erred in said opinion in finding that the property of the defendant Railway Company was sold subject to the liens of certain mortgages on the constituent companies.

7. The Court erred in said opinion in holding that the petition of The Indianapolis Union Railway Company et al. was auxilliary or ancillary to the foreclosure suits in which they were filed and dependent on those suits for jurisdiction.

8. The Court erred in sustaining the motion of The Indianapolis Union Railway Company ordering that there be stricken out all of the answer of The Cincinnati, Indianapolis & Western Railroad Company except the parts noted and set out in the entry or order of the Court of June 13, 1909.

9. The Court erred in its order of June 26, 1920, in overruling the motion of The Cincinnati, Indianapolis & Western Railroad Company for leave to amend and supplement its answer.

10. The Court erred in its order of July 6th, 1920, in finding that the allegations of the petition of The Indianapolis Union Railway Company et al, were true.

11. The Court erred in its order of July 6th, 1920, in finding that the rights of the defendant, The Cincinnati, Indianapolis & Western Railway Company, in the contract with The Indianapolis Union Railway Company for use of its facilities, dated September 20, 1883, as amended August 20, 1906, sold under the decree of foreclosure in this case, constituted but one contract.

12. The Court erred in said decree in finding that the obligation of the defendant, The Cincinnati, Indianapolis & Western Railway Company flowing from the signature of The Indianapolis, Decatur & Springfield Railway Company, and that flowing from the signature of The Cincinnati, Hamilton & Indianapolis Railroad Company constituted but one contract.

13. The Court erred in finding that the purchaser and its assigns did not have the right to reject the obligations of the contract of The Indianapolis, Decatur & Springfield Railway Company and accept the rights and obligations of the contract of The Cincinnati, Hamilton & Indianapolis Railroad Company.

[fol. 162] 14. The Court erred in finding that the rejection filed by The Cincinnati, Indianapolis & Western Railroad Company of the contract made by The Indianapolis, Decatur & Springfield Railway Company, while accepting the contract made by or in behalf of The Cincinnati, Hamilton & Indianapolis Railroad Company was not permissible under the decree of the court in this cause and was ineffectual.

15. The Court erred in finding that, notwithstanding such rejection, the purchaser and its grantee, The Cincinnati, Indianapolis & Western Railroad Company, was bound by the obligations incurred by the signatures of both The Indianapolis, Decatur & Springfield Railway Company and the obligations of The Cincinnati, Hamilton & Indianapolis Railroad Company to the said contract of September 20, 1883, as amended August 20, 1906.

16. The Court erred in so construing the decree of foreclosure and order of confirmation in this cause as not to permit the rejection of the contract made by The Indianapolis, Decatur & Springfield Railway Company while retaining the benefits of the contract made by or in behalf of The Cincinnati, Hamilton & Indianapolis Railroad Company.

17. The Court erred in holding that if The Cincinnati, Indianapolis & Western Railway Company was bound by only one contract for the use of the tracks and facilities of The Indianapolis Union Railway Company, then it and its successors, including The Cincinnati, Indianapolis & Western Railroad Company must pay the rental for two railroad companies under paragraph numbered seventh of September 20, 1883, and in failing to hold that if there were only one contract The Cincinnati, Indianapolis & Western Railroad Company was only bound to pay the rental for one railroad company under said paragraph numbered seventh of the contract of September 20, 1883.

18. The Court erred in failing to hold that The Cincinnati, Indianapolis & Western Railroad Company did reject the contract between The Indianapolis Union Railway Company and The Indianapolis, Decatur & Springfield Railway Company, in accordance with the terms of the decree of this Court dated June 29, 1915, and the order of confirmation dated October 13, 1915.

19. The Court erred in holding that The Cincinnati, Indianapolis & Western Railroad Company was obligated to pay the rentals due under each of the contracts between The Indianapolis Union Railway Company and The Indianapolis, Decatur & Springfield Railway Company and The Cincinnati, Hamilton & Indianapolis Railroad Company.

[fol. 163] 20. The Court erred in overruling the first of the exceptions of The Cincinnati, Indianapolis & Western Railroad Company to the report of the Special Master.

21. The Court erred in overruling the second of the exceptions of The Cincinnati, Indianapolis & Western Railroad Company to the report of the Special Master.

22. The Court erred in overruling the third of the exceptions of The Cincinnati, Indianapolis & Western Railroad Company to the report of the Special Master.

23. The Court erred in confirming the report of the Special Master.

24. The Court erred in its final decree of December 17th, 1920, in decreeing that The Indianapolis Union Railway Company recover from The Cincinnati, Indianapolis & Western Railroad Company the amount of two shares of fixed rental.

25. The Court erred in ordering and decreeing that the petitioner, The Indianapolis Union Railway Company recover from The Cincinnati, Indianapolis & Western Railroad Company the same amount as would be due in case there were two contracts with The Indianapolis Union Railway Company in force, to the performance of the obligations under both of which The Cincinnati, Indianapolis & Western Railroad Company were bound.

26. The Court erred in ordering and decreeing that the petitioner, The Indianapolis Union Railway Company recover from The Cincinnati, Indianapolis & Western Railroad Company the sum of $153,956.10.

27. The Court erred in awarding to the petitioner, The Indianapolis Union Railway Company, any amount in excess of that tendered by The Cincinnati, Indianapolis & Western Railroad Company as the amount due from it under an obligation to pay the rental due from one railroad company under paragraph numbered seventh of said contract of September 20, 1883.

28. The Court erred in awarding interest to The Indianapolis Union Railway Company.

29. The Court erred in awarding interest to The Indianapolis Union Railway Company on the amount of rental which The Cincinnati, Indianapolis & Western Railroad Company had tendered from month to month totaling $73,142.46.

30. The Court erred in ordering and decreeing that The Cincinnati, Indianapolis & Western Railroad Company pay the costs of this proceeding.

Wherefore, said The Cincinnati, Indianapolis & Western Rail- [fol. 164] road Company prays that the order and decree of the District Court may be reversed.

F. J. Goebel, Waite, Schindel & Bayless, Solicitors for the Cincinnati, Indianapolis & Western Railway Company.

ORDER ALLOWING APPEAL OF THE CINCINNATI, INDIANAPOLIS & WESTERN R. R. CO.—Filed December 18, 1920

This 18th day of December, 1920, came the intervenor, The Cincinnati, Indianapolis and Western Railroad Company, by its Solicitors, F. J. Goebel and Morison R. Waite, of Waite, Schindel & Bayless, and filed herein and presented in open court its petition for an appeal from the final decree entered herein on the 17th day of

December, 1920, and likewise filed with its petition an assignment of the errors complained of and intended to be urged by it, and praying also that the transcript of the record proceedings and papers upon which the decree and order herein were entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit; upon consideration whereof the court does hereby in open court allow said appeal upon said The Cincinnati, Indianapolis and Western Railroad Company giving bond according to law in the sum of Eighty-five Thousand ($85,000.00) Dollars and good and sufficient security to be approved by the court; and said The Cincinnati, Indianapolis and Western Railroad Company having then produced and filed its bond as aforesaid with The United States Fidelity and Guaranty Company as surety, which is approved by the court, it is ordered that said order and decree against the Cincinnati, Indianapolis and Western Railroad Company, and all pro-
[fol. 164½] ceedings thereunder against it, be and the same hereby are stayed and suspended pending said appeal.

Peck, United States District Judge.

Date: December 18, 1920.

[fol. 165] OPINION—Filed February 7, 1922; Submitted December 15, 1921; Decided February 7, 1922

Before Knappen, Denison and Donahue, Circuit Judges

KNAPPEN, Circuit Judge:

For several years prior to 1883, the Indianapolis Union Railway Company (an Indiana corporation) had been engaged at Indianapolis in operating, union railway depot and union railway tracks for the use and benefit of several railroads entering that city, its properties being owned by the various railroad companies. The Union Railway Company had also acquired a perpetual lease of a certain belt line. On September 20, 1883, an agreement was made between the Union Railway Company and the various proprietary companies referred to,[1] (afterwards fully carried out) for the conveyance by the latter to the former of the railroad properties theretofore used by the Union Railway Company, for a perpetual lease of the belt line, for the acquisition by the Union Railway Company of further lands for union depot facilities, and for the erection of a new depot and the construction of the necessary additional tracks appurtenant thereto. A fixed rental for the use of the Union Railway facilities was created by way of interest at 7 per cent upon the appraised valuation of the Union Railway properties and the belt

[1]The five original proprietary companies, all of whom joined in the agreement, were the Chicago, St. Louis & Pittsburgh Railroad Company, the Jeffersonville, Madison & Indianapolis Railroad Company, the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, the Terre Haute & Indianapolis Railroad Company and the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company.

line lease, including the value of additions and betterments to be made to the Union Railway property from time to time thereafter—this fixed rental to be "from time to time divided into as many equal shares as there are railroad companies using said property, and each company so using the same shall pay one of said shares." There was also express provision that "no abatement shall be made from the fixed rental so to be paid by each company, by reason of such company not using either the union passenger depot or the Belt Railway." Subject to certain rights of the proprietary companies, not involved here, the current operation, maintenance, renewal and repair of the Union Railway property and of the Belt Railway were [fol. 166] to be conducted by a board of managers composed of one representative from each company using the Union Railway property. In addition to the fixed rental referred to, the expenses of operation, maintenance, etc., of the tracks of the Union Railway Company and of the belt line were to be divided among the several companies using each system, "in proportion to such use, on the basis of wheelage." Express provision was made for the admission of seven named non-proprietary companies (in addition to the proprietary companies named) to the "joint use of the said Belt Railway and Union Railway Company property," upon such non-proprietary companies severally signing and sealing a copy of the agreement referred to, the non-proprietary companies not thereby becoming members of the Union Railway Company. The grant of right of joint use of these railway properties was declared "perpetual to the companies accepting the same and executing a certified copy of this agreement."[2]

In consideration of the recited fact that "the large prospective outlay for new extended facilities as herein contemplated by the Union Railway Company is about to be incurred mainly in the interest of the companies other than the proprietary companies, said companies do each by their acceptance of this grant, and especially by their signing and sealing the certified copy hereof, bind and obligate themselves severally, their successors and assigns, to forever continue in the joint use aforesaid, and subject to and upon the terms and conditions herein stated." Among the seven non-proprietary companies duly executing and accepting the agreement were the Indianapolis, Decatur & Springfield Railway Company (then owning and operating a railroad westerly from Indianapolis) and the Cincinnati, Hamilton & Indianapolis Railroad Company, then owning and operating a railroad east of Indianapolis. August 20, 1906, an amendment was made to paragraph 11 of this agreement in a respect not important here. This amendment was agreed to by the successor of the two signatory non-proprietary railroad companies just mentioned. This entire contract is here known as the contract of September 20, 1883, and August 20, 1906, and is valid under the [fol. 167] laws of Indiana. See Act of March 2, 1885 (Burns Ann.

[2]In addition to the five proprietary companies and the seven non-proprietary companies referred to, the contract was executed by an eighth non-proprietary company. The fixed rental was therefore divided into thirteen equal parts, of which each company paid one.

Ind. St. of 1914, Sec. 5356 et seq.), which was accepted by the Union Railway Company under the authority of that act.

The Indianapolis, Decatur & Springfield Railway Company (the line west of Indianapolis) was succeeded by the Indiana, Decatur & Western Railway Company, which latter company and the Cincinnati, Hamilton & Indianapolis Railroad Company (the line east of Indianapolis) were in 1902 merged into a new corporation called the Cincinnati, Indianapolis & Western Railway Company, which gave a so-called "first and refunding mortgage" upon the properties of the Consolidated Company (subject to two prior mortgages of the Cincinnati, Hamilton & Indianapolis Railroad Company on the line east of Indianapolis, and subject to a mortgage of the Indiana, Decatur & Wesern Western Railway Company on the line west of Indianapolis), the bonds secured by this first and refunding mortgage of the new company to be used in refunding each of these three series of underlying bonds. The bonds of the Indiana, Decatur & Western Railway Company were never refunded. Equitable foreclosure of the "first and refunding mortgage" of the Cincinnati, Indianapolis & Western Ry. Company was had in the district court below, and the mortgaged property sold September 9, 1915 (subject to the prior lien of the Indiana, Decatur & Western mortgage), to a reorganization committee which assigned its purchase to the newly organized Cincinnati, Indianapolis & Western Railroad Company, the appellant here, to which company conveyance was accordingly made by the master on or about November 30, 1915, the sale having been affirmed by the district court.[3] Among the items of property specifically ordered by the foreclosure decree in each cause to be sold, and accordingly so sold, was "contract dated September 20, 1883, and amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis." This concededly refers to the contract here involved.

From the time of the contract of 1883, and until the conveyance under the mortgage foreclosure to appellant, the two lines, respectively east and west of Indianapolis, had each paid one full rental; [fol. 168] and during the entire period from the formation of the Cincinnati, Indianapolis & Western Railway Company, in 1902, until the conveyance to appellant company in 1915, the former (the Consolidated Company) paid two rentals, one by virtue of the original contract of the Indianapolis, Decatur & Springfield Railway Company, and the other by virtue of the contract of the Cincinnati, Hamilton & Indianapolis Railroad Company.

The decree of foreclosure in each case contains a provision giving the purchaser under the foreclosure sale, and his successors or assigns, the right for a period of 30 days after the delivery of the master's deed "to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company [the Cincinnati, Indianapolis & Western Railway Company] or its prede-

[3]The Indiana, Decatur & Western Railway mortgage was foreclosed at the same time and in the same court, and the sale had under decree in each case, the purchaser thus taking title free from the prior Indiana, Decatur & Western mortgage.

cessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the clerk of this court within said period of thirty days." On December 24, 1915, the appellant, under assumed authority of that provision, attempted to reject its liability for more than one rental, by filing in each of the two foreclosure cases a so-called election "not to assume or adopt * * * the * * * contract dated September 20, 1883, and the amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis, in so far as such rights are conferred by the signature of the Indianapolis, Decatur & Springfield Railway Company to said contract. This assignee hereby expressly accepts such contract as made with the Cincinnati, Hamilton & Indianapolis Railroad Company, and desires to accept the benefits of the contract with said company, and the right to occupy the tracks of the Union Railway Company and the Indianapolis Belt Railway Company, therein conferred." The Indianapolis Union Railway Company and the three proprietary companies[*] which succeeded the five original signatory proprietary companies thereupon filed, in the foreclosure cause in the court below, their petition asking that the defendant be required to show cause why [fol. 169] it should not be ordered to make payment to the Indianapolis Union Railway Company of the full amount that would have been payable to that company by the Cincinnati, Indianapolis & Western Railway Company "if it had continued in the use and enjoyment of the railroad property rights and privileges described in and ordered to be sold by the decree of foreclosure and sale made and entered by the aforesaid court in the above entitled cause." There was prayer for other and further relief. A motion to dismiss the petition for lack of jurisdiction and for failure to state a cause of action in equity was overruled. Answer was then made on the merits. Upon hearing on the pleadings, the district court denied, upon the merits, defendant's claimed right of election by way of rejecting liability under the contract of the Indianapolis, Decatur & Springfield Railway Company, and held defendant liable to perform the rental contracts of both the Indianapolis, Decatur & Springfield Railway Company and the Cincinnati, Hamilton & Indianapolis Railroad Company; and, after reference to and report of master, adjudged defendant liable upon said rental contracts in the sum of $80,813.64 above the conceded liability upon the one contract of the Cincinnati, Hamilton & Indianapolis Railroad Company. This appeal is from that order.

Jurisdiction.—In our opinion the district court had jurisdiction to entertain the petition in question. The Union Railway Company and the proprietary companies were parties to the contract, the rights under which, on the part of the Cincinnati, Indianapolis &

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[*] The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and the Vandalia Railroad Company.

Western Railway Company, had been ordered sold, as part of the assets of the latter company. Both the Union Railway Company and the proprietary companies were thus vitally interested in the effect of that agreement, and thus in the interpretation of the word "contract" as contained in the decree for sale, as respects both description and provision for election. It would have been proper to make these railroad companies parties in advance of the decree, for the purpose of construing the right of election conferred in general terms by the decree, as applied to the contract in question, thus avoiding controversy thereafter (Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, 54); and the court would have had power to permit intervention by petitioners for such purpose (Krippendorf v. Hyde, 110 U. S. 276, 282). Presumably such action would have been taken had the controversy been foreseen. As it developed after [fol. 170] the sale, appellant regarded the contract as consisting of two separate and independent contracts, one on the part of the Indianapolis, Decatur & Springfield Railway Company, the other on the part of the Cincinnati, Hamilton & Indianapolis Railroad Company; and so construed the contracts and the decree as giving appellant the right to reject either one of the contracts, and by paying one rental to enjoy the benefits which would accrue from compliance with both contracts. The appellees contended that appellant was legally bound to observe both contracts, and to pay both rentals, and that it was without power to reject either contract; and that in so doing appellant was acting "without warrant of law and contrary to the provisions and intent of said decree of foreclosure."

When appellee's petition was filed the foreclosure suit was still open. There was still pending the petition of the Union Railway Company for the enforcement of a lien claimed against the property of the Cincinnati, Indianapolis & Western Railway Company. The final order of distribution had not been made. The decree of the district court expressly declared that "all questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this court for further relief at the foot of this decree;" also that the purchaser had "the right to enter his appearance in this court and to become a party to this cause." Appellant had made itself a party to the record under the proceedings relating to the manner of paying the purchase price bid at the foreclosure sale. True, the Union Railway Company and the proprietary companies, not having been parties to the foreclosure suit, were at liberty to contest elsewhere the effect of the election provision and its construction; but it was highly fitting, and in the interest of orderly administration, that the court which pronounced the decree should construe it.[5] Notwithstanding the property had passed from the possession of the

[5]In fact (though not a controlling consideration) the judge who made the foreclosure decree was still on the bench and passed upon the motion to dismiss the petition, as well as the motion of the Union Railway Company to strike out the answer of appellant, or to strike therefrom certain allegations.

court, appellant, as the purchaser, would have had an undoubted right to apply to the court for relief respecting the controversy over [fol. 171] its right of election under the sale. Julian v. Central Trust Co., 193 U. S. 93, 109, 112. As respects jurisdiction to entertain the petition in question: It is the broad general rule that where a bill in equity is necessary to have a construction of an order or decree of a federal court, or to explain, enforce or correct it, such bill may be filed in and entertained by such court, notwithstanding the parties interested in having such construction made would not, for want of diverse citizenship, be entitled to proceed by original bill of any kind in a federal court. Minnesota Co. v. St. Paul Co., 69 U. S. 609, 633; Brun v. Mann—C. C. A. 8—151 Fed. 145; Lang v. Choctaw, Etc., Co.—C. C. A. 8—160 Fed. 355, 360; Hume v. City of New York—C. C. A. 2—255 Fed. 488; 1 Foster's Fed. Pr., 6th ed., Sec. 51. As said in the St. Paul case, supra, at page 633: "The question is not whether the proceeding is supplementary and ancillary or is dependent and original, in the sense of rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the states courts." It is true that in the St. Paul case the bill held properly to be classed as dependent was filed by a party to the original cause; and none of the cases we have cited are on all fours with the instant case. But we think the principles they announce are controlling here. Indeed, it is said in the Choctaw case, supra, at page 360, that "a bill in equity dependent upon a former suit in the same court may be maintained by the purchaser under the decree or by any other party interested therein * * * to restrain, avoid, explain, or enforce the judgment or decree therein." We can see no adequate reason, on either principle or authority, to deny the jurisdiction of the district court to entertain the petition in question upon the record there existing.[6]

[fol. 172] It seems clear that the fact that final decree had been entered, sale made thereunder and possession of the property passed to the purchaser, furnished no bar to the jurisdiction of the court below to entertain the petition. The proceeding was not, strictly speaking, an intervention in the suit. There is, however, no inflexible rule forbidding the allowance of intervention, even after final decree (Unitd States v. Northern Securities Co.—C. C. A. 8—128

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[6]As illustrating the universality of the general rule we have referred to: in Eichel v. U. S. Fidelity, etc., Co., 245 U. S., 102, jurisdiction to maintain a bill in equity to enjoin the prosecution of suits at law in the same court was held referable to the ground of jurisdiction in the suits at law, although that ground of jurisdiction did not exist in the equity suit. In Davis v. Martin—C. C. A. 5—113 Fed., 6, where a court of the United States, in a suit for the foreclosure of a mortgage, had seized property through its marshal, for the purpose of selling it under the provisions of the mortgage, such court was held to have jurisdiction of a suit by a third party (a stranger to the original suit) claiming ownership of the property, to enjoin its sale, as ancillary to the original suit, regardless of the citizenship of the parties. Also compare Gaines v. Clark (D. C. App.), 275 Fed., 1017.

Fed. 808); but a proceeding to obtain a construction, correction or enforcement of a decree presupposes the previous entry of final decree. A proceeding of the character of that before us is not one to enforce a lien upon, or to interfere with the possession of the purchaser. Possession by the court was thus not necessary to jurisdiction. If it were, the lack of possession would equally deny jurisdiction in a state court.

We assume that the district court had the right, in the exercise of its discretion, to refuse to entertain the petition and to remit appellees to their remedy elsewhere. It is enough that it had, as we think, full authority to entertain the petition, and did so.

The Merits.—In our opinion the district court correctly decided the merits of the controversy. The original contract made by the Indianapolis, Decatur & Springfield Railway Company contemplated the use of the depot and track facilities of the Union Railway Company only for a train service west of Indianapolis; that made by the Cincinnati, Hamilton & Indianapolis Railroad Company contemplated the use of such facilities only for a train service east of Indianapolis. There never has been physical connection between those two original roads, except through the facilities furnished by the Union Railway Company and its belt line. By the contract each of these two companies agreed to pay one rental, which then and now means the aggregate 2-13 of the fixed rental. In 1902 the Consolidated Company became obligated to pay in perpetuity the two rentals. It is only by virtue of the rental contract, and the obligation of the Consolidated Company to pay two rentals, that the latter ever had a through line from Hamilton, Ohio, to Springfield, Illinois. In 1906 the Consolidated Company contributed to the amendment of the original contract by causing its signing by each of its constituent companies. It continued to pay that rent without protest to the time of the foreclosure sale in 1915. Appellant ex-[fol. 173] pressly concedes the obligation of its predecessor so to do. Such was the situation, and such the legal obligation, of the Consolidated Company when the foreclosure sale was made. Appellant is presumed and we think was bound to know this. The rental contract had become, in effect, but a single contract on the part of the Consolidated Company. Appellant, upon confirmation of the sale, went into immediate possession of the properties of the Consolidated Company, including the enjoyment of the Union Railway Company's facilities. In these circumstances, it is unnecessary to consider what would have been appellant's obligation had it repudiated the existing contract between its predecessor and the Union Railway Company. This it did not do. Nor need we consider what the result would have been had the respective lines originally owned by the I. D. & S. Ry. Company and the C. H. & I. Railroad Company been sold to separate purchasers. That again, did not happen. The single question is—did appellant, by virtue of the foreclosure sale, acquire the right to disavow the rental contract of one of its predecessors (made with reference to the line west of Indianapolis) and at the same time hold onto the contract made by the other of its predecessors (with reference to the line east of Indianapolis);

and, so, by paying 1-12 of the fixed rental instead of 2-13 have the Union Railway service for the benefit of both original lines?

It is clear in our minds that this question must be answered in the negative. We think the description in the decree of sale, viz: "The contract dated [etc.] under which the tracks of the Union Railway Company are occupied in Indianapolis" me-nt the contract as it existed between the Union Railway Company and the Consolidated Company when the decree was made; and that the election provision (we assume it was in the form usual in railroad foreclosure decrees) gave the option of adopting or rejecting the contract in toto, but was not intended to confer the right to accept all the benefits and at the same time reject a portion of the burdens conferred by it. Such construction would be unnatural and unreasonable. As Judge Peck well said: "There was but one contract sold, although the railway company [the consolidated company] was bound thereto as to each of the parties to which it had succeeded. While the purchaser had the right to accept or reject the same, it had to take or leave the obligation of the railway company [the con-[fol. 174] solidated company] to the terminal company in full and as it then existed under said contract. It did not have the right to restore the status which had existed when its two ancestors in title were severally parties thereto, and elect to stand in the shoes of the one but not of the other. * * * Here there was an attempt to adopt the rights of one ancestor in title as to this contract and reject the rights of the other ancestor. Such was not the election required or permissible under the decree, and was ineffectual to operate as a rejection."

We see no force in the criticism that the petition states no cause of action. It does not contravene Equity Rule 37, that an intervention must be "in subordination to and in recognition of the propriety of the main proceeding." It recognizes the propriety of the main proceeding. It merely asks, in effect, that the decree be construed as not permitting the attempted election. The proposition that what the court below did was to construe the contract and not the decree overlooks the fact that the construction of the contract is necessarily involved in the construction of the decree. The court is presumed to have intended a just and reasonable, rather than an unjust and unreasonable, provision for election.

Whether or not the rental agreements were easements running with the land conveyed, and whether or not the mere purchase under the foreclosure decree amounted to an assumption of the rental contracts,[7] we are unable to assent to the contention that the petition shows no liability thereon, for the reason that it speaks of the two contracts as being binding upon the appellant and denied its right to reject either of them. The course of reasoning by which the correct result was reached is not highly important; and the conclusion stated is not weakened by Judge Peck's expressed view that the attempt to adopt the former rights of the Cincinnati, Hamilton

[7]See Union Depot Co. v. C. K. & N. Ry. Co., 113 Mo., 214; St. Joseph Union Depot Co v. C., R. I. & P. Ry. Co., 131 Mo., 291; St. Joseph Union Depot Co. v. C., R. I. & P. Ry. Co.—C. C. A. 8—89 Fed., 648.

& Indianapolis Railroad Company was ineffectual under the decree in the other foreclosure case. The argument that the Union Railway Company was not harmed by the election is beside the mark. Lack of prejudice is not shown by the fact that had there been an election to reject the entire contract the Union Railway Company might have lost two rentals instead of one. The record contains no [fol. 175] suggestions that rejections in toto was ever contemplated. The inferences, so far as there are any, are to the contrary. The criticism that the petition does not assert that any limitation was imposed by the contract upon the use of the Union Railway Company's facilities is likewise beside the mark, in view of the conclusion that the contract contemplated by the decree, and the right of election contained therein, was the single contract of the Consolidated Company.

It follows from these views that the court rightly overruled the demurrer to the petition for alleged lack of showing of right to equitable relief.

In our opinion the district court did not err in striking out certain allegations of the answer. We see no merit in the proposition there asserted that by the decree in the suit for foreclosure of the I. D. & W. Ry. Company mortgage the court represented and held out to the purchaser that there had been no merger of the two rental contracts; or in the assertion that whatever title to the I. D. & W. property was acquired by the purchaser under the refunding mortgage foreclosure was cut off by sale and foreclosure of the I. D. & W. mortgage. We also see no force in the suggestion that the contract has been wrongly construed against the purchasing company because, as asserted, two specified railroads, coming in from one direction and going out in another, were required by the contract to pay but one rental for the Union Railway Company's facilities; and that in practice the contract has been construed as regards others than appellant as creating no limitation upon the use of the facilities, nor as increasing the fixed rental, but only as affecting the proportion of operating expenses on wheelage basis; nor that, as asserted, the share of the total fixed rental which, under the construction adopted below, the purchasing company would be required to pay is inequitable and oppressive, by reason of the small amount of business transacted and earnings made by it. There is no allegation that appellant received less favorable treatment than accorded to successors of other signatory companies; nor that is has been refused permission to extend its service in the same way that other railroads have been permitted to do.

The assertion of delay, laches and estoppel is well answered by Judge Hollister, who said:

"The facts rebut any suggestion of laches or of estoppel in pais. [fols. 176 & 177] The position of the defendant has not only not been acquiesced in at any time, so far as the court can see, by the Indianapolis Union Railway Company or the other petitioners, but the defendant knew ever since the first payment of rental was due after the sale that the Union Railway Company was demanding two rentals. The defendant has not been thrown off its guard, or deceived or misled in any way. It made its large expenditures on its

own risk. The bringing of this suit, October 24, 1916, was not an unreasonable delay."

The district court having acquired jurisdiction for the purpose of determining the rights of the parties under the election provision had, in our opinion, jurisdiction to award recovery for the sum necessarily found to be owing by appellant to the Union Railway Company under the construction adopted by the trial court, and on the principle that courts of equity "will not do justice by halves." Tayloe v. Merchants Fire Ins. Co., 9 How. 390, 404; Eames v. Home Ins. Co., 94 U. S. 621; Camp v. Boyd, 229 U. S. 530, 552; Springfield Co. v. Barnard Co.—C. C. A. 8— 81 Fed. 261, 263-5. Indeed, appellant makes no suggestion to the contrary.

The order of the district court is accordingly affirmed.

[fol. 178] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE OF INDIANAPOLIS UNION RAILWAY COMPANY ET AL. FOR TRANSCRIPT OF RECORD—Filed February 25, 1925

It is hereby requested that the following portions of the record and proceedings, in addition to those designated by the Præcipe of the Cincinnati, Indianapolis and Western Railroad Company, filed herein February 18, 1925, be included in the record on appeal:

(1) Petition of The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and The Vandalia Railroad Company, filed October 24, 1916.

(2) Agreement of September 20, 1883, and Amendment of August 20, 1906.

(3) Motion of The Cincinnati, Indianapolis & Western Railroad Company to dismiss the foregoing petition, filed December 1, 1916.

(4) Opinion of Hollister, District Judge, on motion to dismiss the foregoing petition, filed January 9, 1918.

(5) Order overruling motion to dismiss petition filed March 2, 1918.

(6) Answer of Cincinnati, Indianapolis & Western Railroad Company to said petition, filed March 20, 1918.

(7) Motion of Indianapolis Union Railway Co. et al. to strike out the answer and from answer of Cincinnati, Indianapolis & Western Railroad Co., of March 20, 1918, filed April 7, 1919.

[fol. 179] (8) Opinion of District Judge Hollister on the foregoing motion of Indianapolis Union Railway Co., et al., filed May 27, 1919.

(9) Order on motion to strike out, filed June 30, 1919.

(10) Motion of Cincinnati, Indianapolis & Western R. R. Co. for leave to file amended and supplemental answer, filed April 6, 1920.

(11) Amended and supplemental answer of Cincinnati, Indianapolis & Western R. R. Co., attached to its foregoing motion of April 6, 1920.

(12) Opinion of District Judge Peck, denying leave to file the foregoing amended and supplemental answer, filed May 17, 1920.

(13) Order overruling motion of Cincinnati, Indianapolis & Western Railway Co. for leave to amend answer, filed June 26, 1920.

(14) Order granting Indianapolis Union Railway Co. leave to amend its petition, filed July 6, 1920.

(15) Order upon the petition of Indianapolis Union Railway Co., et al. vs. The Cincinnati, Indianapolis & Western Railroad Co., filed July 6, 1920.

(16) Final decree of the District Court, filed December 17, 1920.

(17) Petition of The Cincinnati, Indianapolis & Western Railroad Co. for appeal, filed December 18, 1920.

(18) Assignment of errors of said appeal, filed December 18, 1920.

(19) Order allowing appeal of The Cincinnati, Indianapolis & Western Railroad Co., filed December 18, 1920.

(20) Opinion of U. S. Circuit Court of Appeals for the Sixth Circuit, rendered February 7, 1922, and order entered thereon.

(21) Order of the Supreme Court of the United States denying petition for writ of certiorari, entered May 1, 1922.

The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, by Baker & Daniels, L. J. Hackney, Maxwell & Ramsey, Their Solicitors.

[fol. 180] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, B. E. Dilley, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing is a true, correct and complete Transcript of those

portions of the record and proceedings in Cause No. 50, Equitable Trust Company of New York, et al., vs. Cincinnati, Indianapolis & Western Railway Company, et al., indicated in the Præcipe of The Cincinnati, Indianapolis & Western Railway Company, filed therein on February 18th, 1925, and in the Præcipe of The Indianapolis Union Railway Company filed therein on February 25th, 1925, (excepting the "Order of the Supreme Court of the United States denying petition for writ of certiorari, entered May 1, 1922," which is not on file in the District Court), as the same appear of record and on file in the office of the Clerk of said Court in the therein entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 16th day of March, A. D. 1925.

B. E. Dilley, Clerk, by Harry F. Rabe, Deputy. (Seal United States District Court, District of Ohio.)

[fol. 181] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1924

STIPULATION THAT RECORD IN NUMBERED 1010 BE NOT PRINTED AND THAT THAT CASE BE HEARD ON RECORD IN NO. 1009—Filed March 24, 1925

It is hereby stipulated and agreed that the transcript of the record in case No. — October Term, 1924, on the docket of this court, entitled The Cincinnati, Indianapolis & Western Railroad Company, Appellant, vs. The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, Appellees, may also be used, for the purposes of the record on appeal, as the transcript of the record in this cause.

It is further stipulated and agreed that the designation by appellant of parts of the record to be printed (as permitted by Rule 10, Section 9, Rules of Practice of the Supreme Court of the United States) shall be those portions of the record set forth in the præcipe of appellant filed with the Clerk of the District Court of the United States, Southern District of Ohio, Western Division, which præcipe is a part of the record filed in this court, and that the designation by appellees of additional parts of the record to be printed shall be those portions of the record set forth in the præcipe of appellees filed with said Clerk of the District Court of the United States, Southern [fol. 182] District of Ohio, Western Division, which præcipe is also a part of the record filed in this court.

Signed at Cincinnati, Ohio, this 21st day of March, 1925.

The Cincinnati, Indianapolis & Western Railroad Company, by Murray Seasongood, F. J. Goebel, Its Solicitors. The Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, by Joseph S. Graydon, J. J. Daniels, Their Solicitors.

[fol. 183] [File endorsement omitted.]

Endorsed on cover: File No. 30,974. S. Ohio D. C. U. S. Term No. 1009. Cincinnati, Indianapolis & Western Railroad Company, appellant, vs. Indianapolis Union Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Filed March 24th, 1925. File No. 30,974.

(6371)

Office Supreme Court, U. S.
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Supreme Court of the United States

Nos. 1009 and 1010.

328 & 329

OCTOBER TERM, 1924.

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CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY,

Appellant,

vs.

INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, and THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Appellees.

BRIEF OF APPELLANT.

GEORGE W. WICKERSHAM,
MURRAY SEASONGOOD,
F. J. GOEBEL,
Of Counsel.

LESTER A. JAFFE,
On the Brief.

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Supreme Court of the United States

Nos. 1009 and 1010.

October Term, 1924.

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY,

Appellant.

vs.

INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, and THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Appellees.

BRIEF OF APPELLANT.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The appeals in these two cases are from identical decrees of the United States District Court for the Southern District of Ohio, entered in that court on February 7, 1925, in two cases there, dismissing the petitions as amended of the appellant here, the Cincinnati, Indianapolis & Western Railroad Company, petitioner in the District Court in each

case, on the sole ground of want of jurisdiction of the court to entertain the same (R. 49).

The relevant portion of the decree is (R. 49):

> "And the court, being fully advised in the premises, finds that the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, is not ancillary, but is original, and that as an original bill this court is without jurisdiction to entertain the same, because no federal question is presented therein, and because the requisite diversity of citizenship does not exist.
>
> "It is, therefore, ordered, adjudged and decreed that the joint and several motion of the above named defendants be and the same is hereby granted, and that the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, be and the same hereby is dismissed at the cost of said petitioner for the sole reason and ground hereinabove specified."

The court certified in each case, on February 18, 1925 (R. 52-3), that it sustained the joint and several motion of the defendants in the trial court, the Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company (appellees here) and dismissed the petition as amended:

> ". . . on the sole ground that it appears on the face thereof that said petition, as amended, does not show the existence of the requisite diversity of citizenship nor the existence of a Federal question; and that this court, not having found the said petition to be ancillary to any prior suit, but having found the said petition to be original, did thereupon dismiss the same upon the sole ground of want of jurisdiction, as more fully appears from the opinion and supplemental opinion of this court filed herein, which opinion and supplemental opinion are hereby directed to be certified

and transmitted to the Supreme Court of the United States as part of the record herein.

(fol. 85a.) "All of which is hereby certified unto the Supreme Court of the United States conformably to Section 238 of the Act of Congress of March 3, 1911, as amended, known as the Judicial Code." (R. 52.)

The opinions referred to will be found at pages 33 to 42 of the record and pages 45 to 49 of the record. The opinions do not appear in the Federal Reporter.

A stipulation was filed in this court on March 21, 1925, that case No. 1010 should be heard on the record in case No. 1009 in this court and that the printed record in No. 1009, October Term, 1924, should serve as the record in case No. 1010 (R. 120-121). Two cases in the District Court were likewise heard as one.

The appeal in No. 1009 is from the decree of the District Court entered in the cause in that court numbered 50, in equity, on its docket and entitled, *Equitable Trust Company of New York* and *Elias J. Jacoby*, as trustees, complainants, vs. *Cincinnati, Indianapolis & Western Railway Company et al.*, defendants.

The appeal in No. 1010 is from the decree of the District Court entered in the cause in that court numbered 51, in equity, on its docket and entitled, *Central Trust Company of New York* and *Augustus L. Mason*, as trustees, complainants, vs. *Cincinnati, Indianapolis & Western Railway Company et al.*, defendants.

The two cases, Nos. 50 and 51, were mortgage foreclosure suits with necessary diversity of citizenship and amount to establish jurisdiction (R. 14) and the appellant, Cincinnati, Indianapolis & Western Railroad Company, is the assignee of the purchaser at the foreclosure sales (R. 2, 34) and became a party to each cause as such assignee, as permitted in the decree of foreclosure (R. 2, 22 bot.).

The petitions for the dismissal of which for want of jurisdiction of the court, appeals are now taken, sought relief from elections erroneously made by petitioner, which elections were authorized to be made under the foreclosure decrees and the petitions asked for modifications of the foreclosure decrees to permit such relief (R. 2, 11). The last opinion of the trial court was, in substance, that such petitions were not ancillary to the foreclosure cases (R. 45, 49).

The foreclosure decrees provide:

> "The purchaser and his successors or assigns shall have the right, for the period of thirty days after the delivery of the deed or instruments of transfer from the Special Master hereinafter provided for, to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the clerk of this court within said period of thirty days." (R. 23), and
>
> "(11) All questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this court for further relief at the foot of this decree" (R. 26).

The Cincinnati, Indianapolis & Western Railroad Company, which had been incorporated to acquire the railroad and property acquired by the purchaser at said foreclosure sale, believing that, under the foreclosure decree, it had the right to adopt one contract originally made by one of the constituent companies of defendant corporation for use of the tracks of the Union Railway Company in Indianapolis and reject the contract made with the other of said constituent companies for a like use, filed, within

the time prescribed in the decree, its election so to adopt and reject (R. 8). The said Indianapolis Union Railway Company thereupon intervened in said foreclosure suit and asserted its right to hold the railroad company on both contracts, asking that the foreclosure decree be construed in conformity with its contention. The District Court held that by accepting one of said contracts the railroad company became bound by both, and this was affirmed by the Circuit Court of Appeals.

The Railroad Company thereupon filed its petition in the same cause asking to be relieved of the election as so construed by the court by rescinding its election made as aforesaid on the ground of mistake and praying that the foreclosure decree be amended to permit such relief (R. 1, 2, 11). The Indianapolis Union Railway Company and the other railroad companies using the Union Depot in Indianapolis were made parties defendant to the said petition.

The said defendants appeared and filed a joint and several motion to dismiss said petition on the ground

> "that it appears upon the face of said petition, as amended, that the court is without jurisdiction to entertain the same, because the petition, as amended, presents no federal question, and diversity of citizenship requisite to jurisdiction does not appear upon the face of the petition as amended, which, although purporting to be a proceeding in the cause as above entitled, is in fact an independent suit *de novo*" (R. 45).

The court, as before stated, thereupon dismissed the petition as amended for want of jurisdiction (R. 49).

The appeals are taken conformably to *Section 238* of the Act of Congress of March 3, 1911, c. 231 (36 Stat. 1157); Act of January 28, 1915, c. 22, sec. 2 (38 Stat. 804).

Leading cases believed to sustain the jurisdiction are: *Hoffman* v. *McClelland*, 264 U. S. 552; *Central Union Trust*-

Company of New York v. *Anderson County, Texas, et al.*, 268 U. S. 93, 45 Sup. Ct. 427; *Smith* v. *Apple*, 264 U. S. 274, 277.

The decree of dismissal of February 7, 1925, was entered before passage of the recent act affecting the jurisdiction of this court, approved February 13, 1925 (Public Act No. 415, 68th Congress). Section 14 of that Act provides:

> "That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

The recent Act, therefore, has no application to the present appeals.

STATEMENT OF THE CASE.

For convenience, this statement is made as if there were but a single case before the court, because the issues involved in the two cases are the same.

The terminal in the City of Indianapolis was originally established under a contract dated September 20, 1883, whereby five original proprietary companies agreed to an equal division of a fixed rental for the use of the Union Railway facilities by way of interest at 7% upon the appraised value of the Union Railway properties and Belt Line (R. 55). The agreement provided that such fixed rental should be

> "from time to time divided into as many equal shares as there are railroad companies using said property and each company so using the same shall pay one of said shares" (R. 56).

Provision was also made for the admission of other named non-proprietary companies, eight of which subsequently were admitted to the use of the terminal facilities. One of these eight subsequent signatories to the agreement was the Indianapolis, Decatur & Springfield Railway Company (later the Indianapolis, Decatur & Western Railroad), operating a line westwardly from Indianapolis; another was the Cincinnati, Hamilton & Indianapolis Railroad Company, operating a line eastwardly from Indianapolis. The two companies last named, in 1902, were consolidated into the Cincinnati, Indianapolis & Western Railway Company, which from the time of such consolidation until the bringing of the suit to foreclose the mortgages hereinafter referred to, assumed the obligation of, and paid rental under, each of the two contracts of its constituent companies, or, in other words, paid two-thirteenths of the fixed rental (R. 34). In 1906, the said contract of December 14, 1883, was modified by the agreement of all the parties thereto, the agreement of modification being separately signed by the Cincinnati, Indianapolis & Western Railway Company as successor to the contract with the Indianapolis, Decatur & Springfield Railway Company and as successor to the contract with the Cincinnati, Hamilton & Indianapolis Railroad Company (R. 6 bot., 7).

The Cincinnati, Indianapolis & Western Railway Company defaulted in the payment of its mortgage indebtedness, a foreclosure suit was brought in the court below and, in 1915, a decree of foreclosure and sale was entered (R. 14). This decree contained the provision, quoted above, allowing the assignee of the purchaser to elect to assume or not to assume any contract made by the consolidated company or its predecessors in title (R. 3, 23).

Within the thirty-day period, the present appellant (assignee of the purchaser as aforesaid) filed an instrument purporting to reject the contract of one of its predecessors,

and accepting the contract of the other (R. 3). This election was made on the assumption that the two contracts were separate and distinct and that the railroad company had the option to accept or reject either or both of them (R. 8).

In October, 1916 (R. 53), the Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and the Vandalia Railroad Company (the last of which companies has since been absorbed by the second of these companies) (R. 8 bot.), filed in the foreclosure case their petition against the Cincinnati, Indianapolis & Western Railroad Company. These petitioners had not theretofore been parties to the foreclosure suit (R. 113 bot.). They alleged, however, that the railroad company

> "is acting without warrant of law and contrary to the provisions and intent of said decree of foreclosure and this petitioner prays the court that the Cincinnati, Indianapolis & Western Railroad Company shall, within a short time to be fixed by the court, be required to show cause, if any it has, why it shall not be ordered by the aforesaid court to make full payment to the Indianapolis Union Railway Company of the full amount that would have been payable to the Indianapolis Union Railway Company by the Cincinnati, Indianapolis & Western Railway Company if it had continued in the use and enjoyment of the railroad property, rights and privileges described in and ordered to be sold by the decree of foreclosure and sale made and entered by the aforesaid court in the above entitled (fols. 103 and 104) causes, and that your petitioners shall have such other and further relief as the equity of the case may require" (R. 65).

The railroad company moved to dismiss the petition, one of the grounds being:

> "First. This court is without jurisdiction in this cause to make the order or grant the relief for which the petitioners pray, or any part thereof" (R. 66).

In ruling against the railroad company on this motion, the court said:

> "These petitions are in no sense actions for money. Their purpose is to prevent the operation of decrees of this court with respect to a subject in which the petitioners have, and had before the decrees were passed, a vital interest, and which was never adjudicated as to them" (R. 70 bot.), and
>
> "The subject of remedy presents some difficulties, but I think the petitions may be regarded as auxiliary to and ancillary to the foreclosure suits in which they were filed, and dependent on those suits for jurisdiction" (R. 71).

The ultimate decision was that the railroad company was liable for two-thirteenths of the fixed rental (R. 9-10), the decree entered upon the petition reciting:

> "The court further finds that the rights of the Cincinnati, Indianapolis & Western Railway Company in said contract were sold under the decree in this cause, in Equity, No. 50; . . . The attempted rejection filed, to accept in part and reject in part the said obligation, was not permissible under said decree and was ineffectual; . . . and it is ordered that the said decree and proceedings thereunder be and are so construed" (R. 103).

This decree was affirmed on appeal by the Circuit Court of Appeals for the Sixth Circuit (279 Fed. 356; R. 109-18), after first carefully considering the question of jurisdiction

and upholding the jurisdiction of the court (R. 112 bot.-115).

In the course of its discussion of the question of jurisdiction the Court of Appeals said:

> ". . . it was highly fitting, and in the interest of orderly administration, that the court which pronounced the decree should construe it. Notwithstanding the property had passed from the possession of the court, appellant, as the purchaser, would have had an undoubted right to apply to the court for relief respecting the controversy over (fol. 171) its right of election under the sale. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 109, 112" (R. 113 bot.-114 top).

Petition for writ of certiorari to review this judgment of affirmance was denied May 1, 1922, by this court (R. 10), (258 U. S. 629).

The foreclosure decree entered June 29, 1915, contains, as before stated, the following provision:

> "All questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this court for further relief at the foot of this decree" (R. 2, 26).

On July 2, 1924, this appellant moved the court, in the foreclosure case, for leave to file its petition and that notice thereof, with a copy of the petition, be served on the parties in the foreclosure suit named as defendants to the petition (R. 1). This motion was granted (R. 1-2) and a copy of the order granting it and of the petition was duly served (R. 2).

Thereupon appellant filed, on July 2, 1924, its petition in the original foreclosure case (R. 2), alleging, in substance, that until the decision of this court denying the petition for writ of certiorari, petitioner was mistaken as to its rights and obligations arising out of the foreclosure

decree and its election thereunder; that if it had been aware that its election would obligate it to pay two parts of a fixed rental instead of one, it would have rejected all obligations under both contracts, since the payment of two-thirteenths of the said fixed rental was then and is now out of all proportion to the use petitioner ever had made or can make of said terminal facilities and would result in its insolvency. The petition further detailed the hardship suffered by petitioner and prayed for a rescission of petitioner's "acceptance" and for a modification of said foreclosure decree to the extent necessary to effect the same, and for further equitable relief (R. 11).

The defendants thereupon filed a motion to dismiss the petition (R. 13) on the ground that the court was without jurisdiction, and alternatively that the facts did not constitute a valid cause of action in equity, that petitioner's right to a modification of the foreclosure decree was exhausted by the prior proceedings, that the mistakes were mistakes of law only and not of fact, and that the petitioner had been guilty of laches.

The trial court heard the case on the pleadings and rendered its written opinion on the motion to dismiss (R. 33-45 inclusive) holding:

1. The court had jurisdiction to entertain the petition on the ground that the same was ancillary to the original foreclosure suit (R. 36, 37).

2. The mistake was of the character against which equity will grant relief (R. 37, 39).

3. Petitioner was not barred by laches, there are no elements of estoppel involved, no change in position of the adverse parties or features making relief inequitable (R. 39, 40).

4. Petitioner's delay in moving for approximately two years after obtaining knowledge of its rights constituted

a waiver and acquiescence on its part which prevented the granting of the relief prayed for (R. 40, 41).

It should be noted that the trial court, in its opinion, decided all of the matters raised by defendants' motion to dismiss, *including the question of jurisdiction,* in favor of petitioner, but held that the petition should be dismissed on the ground of waiver and acquiescence.

Thereupon, by leave of court first had, petitioner filed an amendment to its petition (R. 43-44) specifically negativing the idea of waiver and acquiescence referred to in the opinion of the trial court, by alleging that petitioner never intended to acquiesce and did not acquiesce in the decision requiring it to pay two parts of the fixed rental instead of one; that during the interim between the denial by this court of its petition for writ of certiorari on May 1, 1922, and the filing of its petition in the court below, on July 2, 1924, it negotiated with defendants to endeavor to rescind and to be relieved of said contract, without recourse to court action; that when petitioner discovered it could obtain no relief without resort to litigation, it expressly made all payments under protest and began preparation for court action in order to obtain relief; that all of the defendants had knowledge that petitioner did not intend to acquiesce; that none of the defendants nor any other company has been in any way prejudiced by the interval of time, but that, on the contrary, benefited by petitioner's double payments during said period.

Defendants then filed another motion to dismiss the petition, as amended (R. 44). The court thereupon rendered a second opinion, supplementing the original opinion (R. 45, 49), holding that it would have had jurisdiction to entertain the petition on the ground that the same was ancillary to the original foreclosure suit and would have granted the relief prayed for, had petitioner asserted its rights within a reasonable time after May 1, 1922, when

certiorari was denied, but holding that petitioner's delay constituted a "new mistake" (R. 48) made in 1922 and that, therefore, the petition, as amended, was not ancillary to the original foreclosure suit because it presented no cause of action for relief from the original mistake in 1915, but only for relief from the alleged "new mistake." The court, therefore, modified its previous opinion and ordered the petition, as amended, dismissed for want of jurisdiction (R. 49) and a decree was entered accordingly (R. 49).

The assignment of error intended to be urged is (R. 50 bot.-51):

> "In connection with its petition for an appeal from the decree entered on the 7th day of February, 1925, the Cincinnati, Indianapolis & Western Railroad Company files the following assignment of error, assigning as error that the District Court erred in dismissing the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, for want of jurisdiction."

ARGUMENT.

1. The District Court had Jurisdiction to Entertain Appellant's Petition because it is Ancillary to the Foreclosure Action.

Appellant's petition sets forth the original foreclosure proceedings (R. 7), including the reservations in the decree (R. 2), details the intervention proceedings of the Indianapolis Union Railway Company in the foreclosure cause and the litigation connected therewith (R. 9, 10) and prays for relief with reference to the subject-matter of property involved in the original foreclosure suit and with reference to the decree therein. The foreclosure decree itself shows that the contracts which were the subject of election or rejection were considered part of the property foreclosed

(R. 7, 30). The right of election was created by the foreclosure decree. Relief from an election erroneously made is the object of the petition.

With respect to these very parties, in this same foreclosure case, the petitioner had been the defendant to a petition brought by the Indianapolis Union Railway Company and the proprietary companies, looking to the interpretation of that part of the decree of foreclosure allowing the railroad company, as assignee of the purchaser, to make an election with respect to the contracts for the use of the tracks of the Union Railway Company. The petitioners had not theretofore been parties to the foreclosure suit. Nevertheless, when the present petitioner made the contention that such petition was not ancillary to the foreclosure case, its contention was overruled and such petition was held to be ancillary.

Moreover, the foreclosure decree was so interpreted that notwithstanding it provided, in terms (R. 23), the assignee of the purchaser

> ". . . shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the clerk of this court, within said period of thirty days"

and the assignee did file such election not to adopt one of the contracts within the period, this was, under the decree, an election to adopt, *nolens volens*, and it was further held that the Union Railway and proprietary companies, on their petition for construction of the decree, were entitled to recover a money judgment against the defendant to their petition.

In the course of its opinion, reaching this result, the Court of Appeals said of the defendant to the petition:

> ". . . appellant, as the purchaser, would have had an undoubted right to apply to the court for relief

respecting the controversy over its right of election under the sale. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 109, 112" (R. 114 top).

Now, the assignee of the purchaser does apply to the court for relief respecting a controversy over its right of election under the sale. Relief from an interpretation placed on the election provision of the decree in the same case, is no less ancillary to the foreclosure case than was a controversy between the same parties reversed, seeking the interpretation of the election provision of the decree.

The effect of a similar specific reservation of jurisdiction in a decree was considered by this court in the recent case of *Central Union Trust Company of New York* v. *Anderson County, Texas, et al.*, 45 Supreme Court 427, decided April 13, 1925, where it was held:

> "The provision of the decree of May 17, 1915, retaining jurisdiction, extended to all questions not determined and reserved the right to resell the property in case the purchaser should fail to make any payment on account of purchase price within a specified time after the order requiring it. The decree of August 10, 1922, confirming the sale, retained jurisdiction over the property with reference to all claims against the railway company and to enforce payment of any judgment therefor out of the property sold. It reserved all questions relating 'to suits now pending in this court in this cause, or affecting the property above dealt with . . . for further hearing and determination. . . .' In view of the reservations in these decrees, the sale and delivery of the railroad properties to the purchaser did not deprive the court of jurisdiction over the property or terminate plaintiff's right to carry on this suit. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54, 28 S. Ct. 182, 52 L. Ed. 379; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 111, 24 S. Ct. 399, 48 L. Ed. 629; *Smith* v. *Missouri Pacific R. Co.* (C. C. A.) 266 F. 653."

In *Cincinnati, Indianapolis & Western Railroad Co.* v. *Indianapolis Union Railway Co. et al.* (C. C. A. 6), 279 Fed. 356, 362, the court said:

> "As respects jurisdiction to entertain the petition in question: It is the broad general rule that where a bill in equity is necessary to have a construction of an order or decree of a federal court, or to explain, enforce or correct it, such bill may be filed in and entertained by such court, notwithstanding the parties interested in having such construction made would not, for want of diverse citizenship, be entitled to proceed by original bill of any kind in a federal court."

In *Lang et al.* v. *Choctaw, Oklahoma & Gulf Railroad Co. et al.* (C. C. A. 8), 87 C. C. A. 307, 160 Fed. 355, 360, the court held:

> "A bill in equity dependent upon a former suit in the same court may be maintained by the purchaser under the decree or by any other party interested therein . . . to restrain, avoid, explain, or enforce the judgment or decree therein."

See also *Hoffman* v. *McClelland*, 264 U. S. 552; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54; *Julian* v. *Central Trust Co.*, 193 U. S. 111; *Fulton National Bank of Atlanta* v. *Hoosier et al.*, 267 U. S. 276, 280, decided March 2, 1925.

That a bill to reform or rescind or otherwise grant equitable relief is ancillary, see *Rosenbaum* v. *Council Bluffs Insurance Co.*, 37 Fed. 724; *Bradshaw* v. *Miners Bank of Joplin* (C. C. A. 7), 26 C. C. A. 673, 81 Fed. 902. Diversity of citizenship is not necessary in an ancillary bill. *Krippendorf* v. *Hyde*, 110 U. S. 276.

The trial court, in its first opinion, finding it had jurisdiction, said, with reference to the question of jurisdiction:

> "If . . . the question presented involves the construction to be placed upon the attempt of the petitioner to accept one contract and to reject the other, under the foreclosure decree, or if the petition seeks to relieve the petitioner from the full force and effect of the decisions in the prior litigation and to procure such modification of the foreclosure decree as will now enable the petitioner to make that election which it is stated it would have made but for its mistake as to the nature of the election afforded by the foreclosure decree and but for the mistake as to its then existing rights thereunder, we are clearly of the opinion that the present petition is ancillary and supplemental to the original actions, and that the court now has jurisdiction to consider the same" (R. 36).

The court, after quoting from the decision, above referred to, of the United States Court of Appeals for the Sixth Circuit in the case between the same parties, continued:

> "And just as a court is unquestionably authorized to entertain a supplemental bill to construe, enforce, and give effect to its decrees and to protect the acknowledged prior jurisdiction of the court, so also it would seem proper to entertain a bill to avoid an inequitable effect of the acts of the purchaser and to relieve such purchaser from the unintended effect of his act under the decree, where such act was the result of honest mistake upon the purchaser's part. This is especially so where, by the decree, the court reserves for future adjudication all questions not then disposed of and gives to any party to the cause the right to apply to the court for further relief at the foot of the decree" (R. 36).

When the petitioner, by leave of court, amended the petition so as to show clearly it had not acquiesced in the two

years intervening between decision by the highest court and bringing of the present suit, the trial court changed its opinion on the question of jurisdiction, which it had sustained in its first opinion, and said (R. 48):

> "Our view of the relationship of the parties likewise has distinct bearing, we have said, upon the other aspect of the question, that (fol. 74) of ancillary jurisdiction. The only mistake of law which in our opinion could have made the present proceedings ancillary to the former ones was the mistaken belief of the petitioner that the contract of one of its predecessors in title might be rejected and the contract of the other predecessor in title accepted. This mistake became inoperative and ineffective in 1922 when the petitioner was fully advised of it, and we are of the opinion that the new mistake under which the petitioner then labored was so independent of or so remote from the operation of the decree in foreclosure that the one can not be said to raise a question in any way ancillary to the other. If cognizable by a court of equity at all it is cognizable only by such court having jurisdiction over the parties and under its general equity powers. It involves no question of construction, interpretation, modification or enforcement of the foreclosure decree. It is a controversy existing between the parties founded upon a contract as definitely and distinctly entered into as if it had been made by document altogether independent of the foreclosure. It is not to be considered as ancillary to the foreclosure suit.
>
> "Therefore, passing the question as to whether this ignorance of its rights under the general law is such a mistake as will warrant relief in equity, and passing the fact that the petitioner is apparently not relying upon this subsequent mistake or ignorance of the law in 1922, it is clear, to the court at least, that this court has not jurisdiction of the present controversy as ancillary to the original actions and proceedings herein . . . In so far as the previous opinion may have seemed to indicate that such rescission would not be

granted, such previous opinion should therefore be modified. We are not at all prepared to so hold. If such independent action were brought, waiver, acquiescence or laches, not having prejudiced the defendant, would presumably not bar consideration of the equities. But this is a very different question from the one here considered, namely, whether a failure to act promptly when the duty for such action was clearly imposed upon petitioner gives rise to a cause of action which is ancillary to our former proceedings herein. In so far as the previous opinion or orders dismiss the petition for want of equity the same should be modified, and the amended petition must be dismissed for want of jurisdiction" (R. 48 and 49).

In this, we think, the court erred. If, as the court in its first opinion held, a petition seeking relief from an election made by mistake is ancillary to the suit the decree in which created the right of election, then, surely, mere delay, explained or unexplained, does not deprive the petition of its ancillary character. Delay, accompanied by elements of estoppel, may sometimes be a ground for refusing relief on the merits. It does not, however, oust the jurisdiction of the court, any more than was the case in *Oliver American Trading Co.* v. *Mexico,* 264 U. S. 440, where the trial court mistakenly thought the immunity of a sovereign state from suit prevented the court from taking jurisdiction as a Federal court, or than was the case in *Smith* v. *Apple,* 264 U. S. 274, where the trial court incorrectly thought that the Federal statute, forbidding enjoining prosecution of suits in state courts, prevented the Federal court as a Federal court from entertaining jurisdiction.

2. Since the Decree Dismissed the Petition on the Sole Ground of Want of Jurisdiction and a Sufficient Certificate was Filed, the Case was Properly Appealed to this Court.

This case falls squarely within the rule laid down by this court in *Smith* v. *Apple*, 264 U. S. 274, 277, where, speaking by Mr. Justice Sanford, the court said:

> "True it is that where a district court dismisses a suit upon the specific ground of want of jurisdiction, this Court, upon a sufficient certificate, acquires jurisdiction of a direct appeal, and, whatever the ground assigned by the district court for the supposed want of jurisdiction, must determine whether or not that court had and should have exercised the jurisdiction thus denied."

In this case, the District Court, by its decree, entered February 7, 1925, dismissed the decree

> "for the sole reason and ground hereinabove specified," viz., "and the Court being fully advised in the premises finds that the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, is not ancillary, but is original, and that as an original bill this court is without jurisdiction to entertain the same because no Federal question is presented therein and because the requisite diversity of citizenship does not exist" (R. 49).

The Court further made the certificate, printed at pages 52-53 of the record, whereby it certified that the decree was entered pursuant to the opinion above referred to, sustaining the joint and several motions of the defendants to dismiss the petition and dismissing the same,

> "on the sole ground that it appears on the face thereof that said petition, as amended, does not show the exist-

ence of the requisite diversity of citizenship, nor the existence of a Federal question; and that this court not having found the said petition to be ancillary to any prior suit and having found the said petition to be original, did thereupon dismiss the same upon the sole ground of want of jurisdiction . . ."

That decree and certificate take the case out of the facts upon which the decision in *Smith* v. *Apple*, (*supra*), were based, and bring it within *Sovereign Camp Woodmen* v. *O'Neill*, 266 U. S. 292, 295.

3. Appellant's Petition, as Amended, is Ancillary to the Foreclosure Suit and the District Court Had Jurisdiction, Therefore, to Entertain It.

The trial court, in its first opinion, held that it had jurisdiction to entertain the petition, but that waiver and acquiescence prevented granting the relief sought and so ordered the petition dismissed for want of equity. The amendment to the petition not only denies specifically any waiver or acquiescence, but sets forth facts which explain the delay from May 1, 1922, to the filing of the petition, July 2, 1924, and which show an intent during that period to rescind, notice of which intention was given to appellees (R. 43-44).

The trial court, in its second opinion (R. 45-49), apparently held that despite these allegations in the amendment to the petition, appellant was under a duty, more promptly than it did, to assert its position and adhere to the same as a condition precedent to any right to relief from the mistaken election made in 1915, and its failure to do so constituted a "new mistake" over which the court had no jurisdiction to grant relief, on the ground that the same was not ancillary. As to this, we contentd that:

(a) The allegations of the original petition show there was neither waiver nor acquiescence since there was no

estoppel or prejudice suffered by appellees, nor any other feature involved making it inequitable to grant relief.

(b) The allegations of the amendment to the petition specifically deny waiver or acquiescence on the part of appellant, and on a motion to dismiss, must be taken as true.

(c) There was no "instant duty" on appellant, as a "condition precedent" to obtaining relief, to bring suit immediately after learning of its legal rights, in May, 1922.

As to (a): Before a court of equity will bar relief on the ground of waiver or acquiescence, there must be present some element making relief inequitable, as something of the nature of an estoppel, some change of position or hardship on the adverse party caused by the delay which constitutes such waiver or acquiescence, or the parties seeking relief must be confronted with the task of choosing two inconsistent remedies. The trial court specifically found that there was no element of laches involved (R. 39), no prejudice suffered by appellees (R. 40), and that there were elements of hardship on appellant "in enforcing an unacceptable obligation and such injustice in penalizing the innocent mistake of a party litigant" (R. 39),—in short, no elements making it inequitable to grant the relief sought. The court simply held that there was imposed upon appellant the duty to assert its position promptly and adhere thereto, and that the mere delay of two years before suit was instituted, notwithstanding the absence of any inequitable features, nevertheless constituted waiver and acquiescence sufficient to bar relief. This is a misapplication of the equitable doctrine of waiver or acquiescence. In 1 *Corpus Juris* 906, it is stated that "acquiescence is a branch of the law of estoppel and is used to defeat a party's action on the principle of equitable estoppel."

That acquiescence is no more than an instance of the law of estoppel by words or conduct, see, *Northern Assurance Co.* v. *Grandview Bldg. Ass'n*, 183 U. S. 308, 357; *Hampton*

Stave Co. v. *Gardner,* 83 C. C. A. 521, 154 Fed. 805, 808; *Hall* v. *Otterson,* 52 N. J. Eq. 522; *Norfolk, etc., Railroad* v. *Perdue,* 40 W. Va. 442; 13 *Halsbury's Laws of England,* p. 397, paragraph 561. Thus, in *Lewin* v. *Telluride Iron Works,* 272 Fed. 590, 598, the court says, "but an estoppel is an essential element of waiver. Where there is no estoppel, there is no waiver." The necessity of some element of estoppel is clearly brought out by the case of *Ormsby* v. *Longworth,* 11 O. S. 653, which was a suit to reform a deed on the ground of mistake. The deed was given and the mistake made in 1819, but the mistake was not discovered until 1834 and suit not brought until twenty years later. This delay was strongly urged as a ground for denying relief, but the relief was nevertheless granted. The court emphasized that there were present no inequitable features and no adequate remedy at law.

An excellent discussion of the doctrines of waiver and acquiescence is given in *Williston on Contracts,* Vol. II, page 1312, note 20, where the learned author says:

> "What is here called waiver may sometimes be implied from silence with knowledge of the facts. This is 'acquiescence' in one of the meanings given to that word. In *DeBussche* v. *Alt,* 8 Ch. Div. 286, 314, Thesiger, J., 'The term "acquiescence" which has been applied to his conduct, is one which was said by Lord Cottenham in *Duke of Leeds* v. *Earl Amherst* (2 Ph. 117, 123), ought not to be used; . . . Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, can not take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise

would be without consideration, and therefore not binding.' Perhaps it should rather be said that acquiescence always means such non-action as to indicate assent that a known situation shall continue. The distinction seems rather to be in the effect of acquiescence than in the meaning of the word. Just as a promise may sometimes create legal consequences and sometimes may not, so acquiescence may form the basis of a true waiver, or it may not, according as change of position is made in reliance upon it."

In none of the cases cited by the court in its opinion (R. 40) was a litigant denied relief solely on the ground of waiver or acquiescence. In all of them there was either an element of estoppel, change of position, laches or facts negativing the existence of any mistake. Several of the cases cited can be readily distinguished on the additional ground that the party seeking relief had two remedies available, one at law and the other in equity, and that an unreasonable delay might deprive such party of relief in equity, although he was still entitled to relief at law. The remedies at law and in equity being inconsistent, long acquiescence is frequently held to constitute an election to take the legal remedy and a waiver of the equitable remedy. See *Stuart* v. *Hayden*, 18 C. C. A. 618, 72 Fed. 402, 411; *Miller* v. *Continental Ship Building Co.*, 265 Fed. 158. For example, in *Grymes* v. *Sanders*, 93 U. S. 55, referred to by the trial court as the leading case in support of its position, relief was denied by the court, first, on the ground that the original mistake of the plaintiff, if any, was due to the plaintiff's negligence; second, the mistake was either not made out or was wholly immaterial and was so considered by the plaintiff, and acquiescence entered into the case only to show that the mistake was considered immaterial by the plaintiff; third, the element of estoppel or change of position was present, the court stating that "a court of equity

is always reluctant to rescind, unless the parties can be put back in statu quo."

As to (b): Despite the fact appellant considered that its petition, as originally filed, showed no waiver or acquiescence, nevertheless, in view of the first opinion of the trial court, an amendment was filed denying any waiver or acquiescence and denying any intent to acquiesce. The amendment, moreover, alleges that appellant gave notice to appellees of its intention to rescind. All of these allegations, on a motion to dismiss, must be taken to be true. The intent to waive or acquiesce is an essential element of the doctrine of waiver and acquiescence and in the absence thereof these doctrines are not applied as a bar to relief. See *Dorrance* v. *Barber,* 262 Fed. 489, 492; *Pierson & Co.* v. *Iwai & Co.,* 285 Fed. 769; see also 1 *Corpus Juris* 905-907.

As to (c): Even in the second opinion, the trial court says that "if promptly asserted, . . . such relief should have been granted. A petition to achieve that result would have been truly ancillary to the foreclosure proceedings" (R. 47). The trial court, however, held that appellant was under an instant duty of announcing its purpose to reject both contracts immediately upon learning of its rights in May, 1922 (R. 46); that the fact of appellant's intention not to waive or acquiesce and the absence of inequitable features were wholly immaterial (R. 46, 47). The court then concludes that:

> "The only right given by the decree was to reject within the short period allowed. The petitioner was advised in 1922 that it must reject both contracts or neither. It saw fit not to reject both. It therefore became bound by both, and the only mistake which it could possibly now urge was that in May, 1922, counsel did not inform it that both contracts could still be rejected, that they were mistaken as to their legal rights in this particular and at that time" (R. 47).

Here the *ratio* of the decision seems to shift from the waiver and acquiescence feature to the theory of condition precedent. The court, in its second opinion, says:

> "The right is not now unenforceable by reason of any waiver or acquiescence in the sense of estoppel, but the right to reject has ceased to exist by reason of breach of the condition precedent that it be promptly asserted. The right given was not of election in the sense of the necessity of definite action either to accept or reject, but was really an option to reject, which option has expired."

In other words, the reason that the court has lost jurisdiction now and the reason that appellant is denied relief is held to rest upon the fact that petitioner did not exercise its right to rescind forthwith after May, 1922. This basis of the decision, ordering the amended petition dismissed, can in no way be supported by the authorities on waiver and acquiescence cited by the trial court in the first opinion. The court apparently was influenced by the form of the foreclosure decree which limited the right to elect or reject within thirty days (R. 3). But this provision obviously has nothing to do with the time within which appellant must sue to rescind an election made by mistake under said decree. Once the election was made, the provision as to thirty days is no longer applicable and its force was spent.

True, it might be urged that appellant would be required to file suit to rescind within a reasonable time after knowledge of its rights. As a matter of fact, the delay of two years is explained by the allegations in the amendment to the petition and such delay can not be considered an unreasonable one.

The foregoing argument with reference to waiver and acquiescence may seem to involve a discussion of the merits; yet, in view of the peculiar theory of the trial court, is

intimately related to the question of jurisdiction. Since the Court held that because of waiver, acquiescence or condition precedent, appellant's petition did not present a cause of action for relief as to a mistaken election made in 1915, but only for relief from a "new mistake" made in 1922, if the court erred in its holding on waiver, acquiescence and condition precedent, then the mistake in 1915 presented by the original petition constitutes the only mistake involved in the case, *as to which the court conceded it had jurisdiction.*

Indeed, even if the theory of the court that there was a new mistake made in 1922 were correct, the petition, as amended, is still ancillary. No "renewed contract relation" (R. 47) came into existence through appellant's inaction in 1922. Even on the theory of a new mistake, the petition seeks relief from the obligation created by the foreclosure decree and the election thereunder, is sought by a party to that foreclosure decree, concerns property involved in that decree,—in fact, deals with a contract sold pursuant thereto. If appellant's original petition could be entertained by the District Court, the same considerations apply to give jurisdiction over the amended petition. Save for the factor of an explained delay for two years, appellant's petition, as amended, sustains the same relation to the foreclosure decree as appellant's original petition.

We do not elaborate, because unrelated to the question of jurisdiction, other features of this case, such as the fact that the law favors compromise of disputes and should not penalize appellant for attempting to adjust this controversy amicably, after it knew its rights, before proceeding with court action; or, that the obligation requiring the payment of two parts of the fixed rental imposes such a hardship upon appellant that if no relief is granted, appellant will become insolvent and unable to function as a common carrier (R. 11). Moreover, in determining whether delay,

with a definite statement of non-acquiescence and non-intention to abide by the situation, or the failure to bring a suit to rescind within two years (when appellees were put on notice that such suit would be brought if other efforts failed), amounted to an election, as a matter of law, to accept the contract requiring two-thirteenths payment, this Court should have in mind the extreme hardship of such a conclusion. If it were necessary to cease to use the Union terminal facilities in order to prevent an election to be bound by the contract, then appellant is in the situation of going to an enormous expense in providing terminal facilities of its own at its two points of entrance into Indianapolis with the danger that if suit were instituted a court might, for some reason, deny it relief, although it would still have the liabilities of the old contract, with interest and penalties, in addition to the expense of the new terminal arrangement. Surely, there is a public policy which would operate to prevent the requirement of such an expenditure!

We urge that the District Court had jurisdiction of appellant's petition, as amended, and should have heard and determined the merits and that the decree of said court dismissing the petition, as amended, for want of jurisdiction, on the ground that the same was not ancillary to the original foreclosure suit, should be reversed.

Respectfully submitted,

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Office Supreme Court, U. S.
FILED
NOV 24 1925
WM. R. STANSBURY
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IN THE

Supreme Court of the United States

CINCINNATTI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY, *Appellant*,

vs.

INDIANAPOLIS UNION RAILWAY COMPANY, *et al.*, *Appellees*.

October Term, 1924.

Nos. ~~1009-1010~~ 328-329

APPELLANT'S REPLY BRIEF.

GEORGE W. WICKERSHAM,
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PRINTED IN THE UNITED STATES BY INGLE, INC., 206-8 FULTON ST., NEW YORK.

Supreme Court of the United States

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY, *Appellant,*

against

INDIANAPOLIS UNION RAILWAY COMPANY, *et al.,* *Appellees.*

Nos. 1009 and 1010 October Term, 1924.

APPELLANT'S REPLY BRIEF.

The argument of Appellees is that Appellant became bound by an executed contract of purchase from the Receiver of Chicago, Indianapolis & Western Railway Company, and that its petition to the District Court, of which that tribunal held it had not jurisdiction, was simply a suit seeking rescission of

> "Appellant's accepted contract with the Indianapolis Union Railway Company."

But from the beginning Appellant has contended that there never was "an accepted, binding, definite contract" between it and the Indianapolis Union Railway Company; that the minds of the parties had never met on the same proposition, and that while the decision of the District Court, which was affirmed by the Circuit Court of Appeals, and which this Court declined to review on certiorari, was adverse to its contention on this point, that decision bound Appellant by construction to a con-

tract which, in its own opinion, it never had made; a construction based upon provisions in the foreclosure decree, which, by the petition in the instant case, it sought to have modified so as to relieve it from the effect of a judicially imposed liability.

It should be remembered at the outset that two contracts had been made with the Indianapolis Union Railway Company; (1) between that Company and the Indianapolis, Decatur & Springfield Railway Company (afterwards called Indianapolis, Decatur & Western Railroad Company), and (2) between the Indianapolis Union and the Cincinnati, Hamilton & Indianapolis Railroad Company. After the consolidation of the Indianapolis, Decatur & Western Railroad Company with the Cincinnati, Hamilton & Indianapolis Railroad Company into the Cincinnati, Indianapolis & Western Railway Company, the latter Company recognized and complied with the obligations under both contracts. The mortgage of the Indianapolis, Decatur & Western Railroad Company foreclosed in the suit by the Central Trust Company of New York, only covered, as a part of the assets of the mortgagor Company, the contract between the Indianapolis Union Railway Company and that single Company. The First and Refunding Mortgage of the Cincinnati, Indianapolis & Western Railway Company covered all the properties of that Company, including the contractual interests of both of its constituent companies with Indianapolis Union Railway Company, but subject to the prior lien of the mortgage of the Indianapolis, Decatur & Western Railroad Company. The decree of foreclosure in each case contained the clause giving the purchaser, etc., the right for the period of thirty days after the delivery of the deed by the Special Master

> "to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company or its predecessors in title, and

> such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this Court within said period of thirty days." (Rec., p. 23.)

Each foreclosure decree also reserved for future adjudication all questions not thereby disposed of and provided that any party to the cause might at any time apply to the Court for further relief at the foot of the decree. (Rec., p. 26.) Within the specified time, Appellant filed the notice of election and rejection upon which this controversy has arisen. It proceeded on what may have been a mistaken legal basis, but certainly was the logical basis, namely, to reject the contract made by the Indianapolis, Decatur & Springfield Railway Company with the Indianapolis Union Company, and to adopt the contract made by the Indianapolis Company with the Cincinnati, Hamilton & Indianapolis Railroad Company. (Rec., p. 8.) Thereupon, objection to its right to take this action was made, not by its vendor, the Special Master, or the Receiver of Cincinnati, Indianapolis & Western Railway Company, but by Indianapolis Union Railway Company, and the two proprietary companies, who presented their petitions of intervention in the suit, were admitted as parties, and denied the right of Appellant "so to refuse and reject either of said two contracts", and asserted that Appellant was

> "bound by both of said two contracts for the use of the property of the Indianapolis Union Railway Company and is required to make payments upon each of said two contracts of the full amount that would have been payable thereunder by the Indianapolis, Decatur & Western Railway Company, and the Cincinnati, Hamilton & Indianapolis Railway Company, at this time, if the aforesaid consolidation had not been made and if the property

> of the Cincinnati, Indianapolis & Western Railway Company had not been sold under the decrees of the aforesaid court in the above entitled cause and the sale confirmed in the Cincinnati, Indianapolis & Western Railroad Company." (Rec., p. 65.)

They further averred that Appellant

> "in so attempting to refuse and reject one of said contracts and agreements for the use of the property of the Indianapolis Union Railway Company, and in so claiming the right to make such refusal and rejection, under the provisions of the decree of foreclosure and sale by which it acquired the title of the property of the Cincinnati, Indianapolis & Western Railway Company, is acting without warrant of law *and contrary to the provisions and intent of said decree of foreclosure* * * *". (Rec., p. 65. Italics ours.)

Here is the Appellees' own interpretation of Appellant's position at the time and continuously thereafter, namely, that

> "under the provisions of the decree of foreclosure and sale by which it acquired the title of the property of the Cincinnati, Indianapolis & Western Railway Company",

and within

> "the provisions and intent of said decree of foreclosure",

this Appellant was entitled to accept one of the two contracts made by its predecessors in title with the Indianapolis Union Railway Company, without becoming bound by the other one. After the courts decided against it on this contention, and held that the legal effect of its acts constituted an acceptance of both contracts, Appellant filed its petition with the District Court, averring its

mistake as to its rights and obligations under the said contract or contracts with the Indianapolis Union Railway Company as so interpreted, averring that its acceptance or rejection were done through and solely by reason of such mistake, and praying that it should be

> "permitted to rescind its acceptance of the said contract and that such rescission be ordered and that it be permitted to cancel all of the obligations arising under said contract or contracts dated September 20, 1883, and amendment of August 20, 1906, with The Indianapolis Union Railway Company, and that the foreclosure decree in this case be modified to the extent necessary",

and that it should have such further relief as the equity of the case might require and might seem meet. (Rec., p. 11.)

In the face of this record, it seems clear to us that the contention of Appellees that Appellants in their petition to the District Court did not seek modification of that Court's decree of foreclosure and, therefore, was not ancillary to the main cause, is refuted by the clear facts of the case.

On the hearing of Appellees' motions to dismiss Appellant's said petition, on the ground that the District Court was without jurisdiction to entertain it, the District Judge first said:

> "If by its action the petitioner is simply seeking to be relieved of the obligations of a contract admittedly entered into by it, upon the ground of mistake and without express reference to the right of election conferred by the decree of foreclosure, the relief sought is so independent of the former proceedings as to be in no sense ancillary or supplemental thereto." (Rec., p. 36.)

But, as above shown, this is not what the petitioner was seeking at all.

The Court then proceeded:

> "If, on the other hand, the question presented involves the construction to be placed upon the attempt of the petitioner to accept one contract and to reject the other, *under the foreclosure decree*, or if the petition seeks to relieve the petitioner from the full force and effect of the decisions in the prior litigation *and to procure such modification of the foreclosure decree* as will now enable the petitioner to make that election which it is stated it would have made but for its mistake as to the nature of the election afforded by the foreclosure decree and but for the mistake as to its then existing rights thereunder, we are clearly of the opinion that the present petition is ancillary and supplemental to the original actions, and that the court now has jurisdiction to consider the same." (Rec., p. 36.) (Italics ours.)

The hypothesis so stated by the Court is exactly the question presented to the Court by Appellant's petition, and the above quoted conclusion sustaining jurisdiction was, we submit, a sound one, and the District Court should be constrained by this Court to adhere to that position.

The District Court went further, and said:

> " * * * so also it would seem proper to entertain a bill to avoid an inequitable effect of the acts of the purchaser and to relieve such purchaser from the unintended effect of his act *under the decree*, where such act was the result of honest mistake upon the purchaser's part. This is especially so where, by the decree, the court reserves for future adjudication all questions not then disposed of and gives to any party to the cause the right to apply to the court for further relief at the foot of the decree." (Rec., p. 36.) (Italics ours.)

The Court added, two paragraphs further on in his opinion, the following:

> "What we have said we think disposes of the question of jurisdiction and of the contention of

> the defendants that the right of the petitioner *to change its election or to modify the foreclosure decree,* or to be relieved from the effect thereof, was exhausted by the prior proceedings in this court and on appeal." (Rec., p. 37.) (Italics ours.)

Having thus sustained the jurisdiction of the Court, and held Appellants to be *prima facie* entitled to the relief sought, the District Judge next proceeded to deal with the various defenses to the granting of that relief. He overruled Appellees' contention that the mistake was one of fact and not of law, and, therefore, the Court had no jurisdiction to grant the relief, (Rec., pp. 37-38); and that no relief could be granted because the mistake was unilateral. (Rec., pp. 38-39.) Finally he turned to the consideration of the defense of laches, distinguishing between laches, on the one hand, and waiver or acquiescence, on the other, and said:

> "If not constituting laches in the technical sense, because of lack of prejudice to the Indianapolis Union Railway Company arising from the delay, yet the delay of the petitioner for more than two years to assert its right to rescission, after express knowledge that it could not adopt and assume one contract and reject the other, or assert the right it now claims to rescind both contracts, is highly indicative of the then intention upon its part to make the best of a bad election and retain the use of the terminal facilities upon the payment of two-thirteenths of the fixed rental." (Rec., p. 40.)

The Court dwelt upon the fact that the delay in asserting these rights was not explained, and held that the failure of Appellant for two years to move to rescind its former action and the payment by it of the rentals falling due under both contracts during this period, in effect made a new election and either waived any rights which might have then existed by reason of the initial mistake, or so acquiesced in the situation in which it found itself,

as to preclude relief upon the grounds then urged, saying:

> "The situation has changed from one in which the petitioner is asking to be relieved from the effect of an election which it never intended to make, to one in which the petitioner can only ask to be relieved of an election intentionally made under misapprehension as to its rights." (Rec., p. 41.)

The situation thus presented, the Court held, had a direct bearing upon the question of jurisdiction.

> "If, abandoning reliance upon the original mistake set up in the bill, the petitioner alleges that its subsequent election was made in ignorance of its right to appeal to a court of equity for relief as from the original election, the petitioner is confronted with the fact that the granting of the relief prayed for in no way involves a construction of the original foreclosure decree nor the construction to be given to any act thereunder. It could only be urged that a right of rescission existed because of facts independent of the foreclosure decree and constituting merely the conditions under which the election was voluntarily exercised. The determination of this question would be separate and distinct from all questions originally before the court and not ancillary or supplementary thereto." (Rec., p. 41.)

But this hypothesis of the Court was not founded on any fact. Appellant did not abandon reliance upon the original mistake, nor assume or admit that it had made a subsequent election from which it asked to be relieved. On the contrary, immediately upon the rendition of this opinion by the District Court, Appellant filed an amendment to its petition, setting forth that it never had intended to acquiesce and did not acquiesce in the decision requiring it to pay two-thirteenths of the rental, contrary to its expressed intention not to do so by the original election filed herein, and averred that it had attempted in

various other ways for a reasonable time, to be relieved of such obligation without recourse to law; that its President had made remonstrances and efforts to be relieved of the unjust burden of said contract; that it made the payments under protest, and that none of the Appellees were in any way prejudiced by the length of time which had elapsed between the time of application for the writ of certiorari and the filing of the petition herein (Rec., pp. 43, 44), and thereupon it renewed its application to the Court for the relief prayed for in the petition thus amended. In other words, Appellant consistently stood on the rights asserted in its petition, and urged its right to the relief therein prayed, namely, rescission of its acceptance of both contracts to which the District Court and Circuit Court of Appeals had committed it, and permission to cancel all of the obligations arising thereunder, and that the foreclosure decree be modified to the extent necessary to the granting of that relief. Confronted with this situation, the District Court thereupon shifted its ground. It said:

> "While the court, in its previous opinion, treated the question as if petitioner were vested with the power of election to accept or reject the contracts in question, *it is to be noted that this was perhaps an unhappy method of expressing petitioner's rights.*" (Rec., p. 46. Italics ours.)

The Court thereupon gave a new construction to the case, by holding that as soon as Appellant was advised that its attempt to reject the contract of one of its predecessors in title was ineffective, and the mistake of law under which the petitioner labored was fully disclosed,

> "*the instant duty* of announcing its purpose to reject both contracts and of adhering to the purpose so announced, was emphasized" (Rec., p. 46). (Italics ours.)

The Court did not take pains to point out any principle of law creating this "instant duty". Appellant had the right to apply to the Court for relief from the construction put by the Court upon Appellant's acts pursuant to the provisions contained in the foreclosure decree, based upon the mistaken view of its rights and the effect of its acts. The Court treats the case as though, on the final determination of the original petition by the refusal of this Court to grant certiorari, everything that Appellant had done was sponged out, and it stood confronted *de novo* with the requirements of the foreclosure decree, within thirty days after such final determination to elect *de novo* whether or not to assume or adopt any lease or contract made by the consolidated Company or its predecessors in title. This is a new doctrine of rescission—rescission *ipso facto* by the refusal of the Court to give a construction to what had been done in conformity with the Appellant's prayer, and the imposition upon it of a new obligation based upon such rescission or wiping out of what previously had been accomplished. In other words, having decided that Appellant was bound by a contract created by judicial construction, the Court then held that this contract might be rescinded only if Appellant applied within thirty days for that relief, and announced this decision two years after the thirty days had expired! We believe there is no basis in law, and certainly we have found no decision, which will sustain any such extraordinary doctrine as this. Whether or not Appellant is properly precluded from securing the relief prayed in this cause by laches or acquiescence, goes not to the jurisdiction of the District Court, but to the question of whether or not its petition shall be granted, and from the decision on that point, Appellant is entitled to a review by appeal in due course. But under every principle applicable to ancillary jurisdiction, the District Court has the power and the duty of considering the petition on its merits.

The Appellees apparently think it is not quite safe to stand on this doctrine of the District Court. They say in their brief (p. 12), that the "accepted contract"—meaning the judicially imposed contract resulting from the action taken by the Appellant pursuant to the foreclosure decree,

> "became in all respects valid and binding on appellant either * * * (*c*) within a reasonable time after May 1, 1922, the day that this court denied the writ of certiorari in the prior litigation."

And again, on page 19 of their brief, they complain that Appellant did not take any action whatever by way of rejecting said contract

> "within thirty days, *or a reasonable time,* after February 7, 1922, the date on which the Circuit Court of Appeals affirmed the decree of the District Court in the prior litigation (R., 109-118). Nor—coming to the very latest date that can possibly be taken—did appellant take any action whatever by way of rejecting said contract within thirty days, *or a reasonable time,* after May 1, 1922, the date on which this court denied appellant's petition for a writ of certiorari (258 U. S. 629)."

And again, on page 20, after quoting from the opinion of the District Court to the effect that the Appellant had an election to reject both contracts or neither, they say:

> "Such option to reject expired, at the very latest, on May 31, 1922, *or within a reasonable time after May 1, 1922.*"

In other words, their main contention is that Appellant's right to reject or to accept both contracts had to be exercised within a reasonable time after May 1, 1922, not as the District Court held, that it was the "instant duty" of Appellant to act. But what is a reasonable time

depends upon the circumstances of the case, and the amendment to Appellant's petition in the court below (Rec., pp. 43-44) states facts showing why Appellant delayed action until the date of the filing of its petition, July 2, 1924. (Rec., pp. 1-11.) The District Judge, in his first opinion, dealt with the question of laches or waiver by saying:

> "The defense of laches ordinarily contemplates either such long delay as to inconvenience the parties in the preparation and presentation of their defense, through the loss of evidence and the fallibility of the memory of witnesses, or such change in the condition and relations of the parties during the period of delay that it would be an injustice to the defendant to permit the plaintiff to assert his rights. Properly speaking, mere delay short of the period of limitations is insufficient to constitute laches. There must be something in the nature of estoppel, some change in the position of the adverse party which makes it inequitable to proceed against him." (Rec., pp. 39-40.)

But when it came to the application of this rule, the Court invoked another principle, namely, that although not constituting laches, Appellant's delay for more than two years to assert its right of rescission was indicative of intent to waive its rights. In other words, he proceeded to decide the case, not on the ground of laches, but of waiver. Then, when the amendment was presented stating facts which clearly rebutted any presumption of waiver, the Court shifted his ground, and adopted the theory of "instant duty of announcing its purpose to reject both contracts", which Appellees modify by transmuting into a duty to act within a *reasonable* time, which again comes down to a matter of defense to Appellant's claim, and does not go to the jurisdiction of the District Court. We have discussed the authorities on the subject of laches and acquiescence. We insist

that Appellant has not been guilty of laches or of acquiescence, as those terms are defined in the law. These points we have discussed in our principal brief, and it is not necessary to repeat them here. We here are simply meeting and attempting to controvert the extraordinary contentions advanced by the District Judge, and to some extent adopted by counsel for Appellees, of a new and substituted obligation imposed upon Appellant on the determination of the previous controversy and of a barrier to the consideration of its right to equitable relief erected upon this assumed hypothetical and unwarranted construction.

Respectfully submitted,

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FILED
NOV 16 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States

NO. 323.

OCTOBER TERM, 1925.

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY,
Appellant,

v.

INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF OF APPELLEES.

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The two opinions delivered in the court below in the instant case are not reported. They are found at R., 33-42 and R., 45-49.

In the prior litigation between the parties, the opinions delivered in the District Court are not reported. They are found at R., 66-73, R., 84-86, and R., 100-101. The opinion of the Circuit Court of Appeals for the Sixth Circuit in the prior litigation is found in Cincinnati, Indianapolis and Western Railroad Co. v. Indianapolis Union Railway Co., et al., 279 Fed. 356 (R., 109-118). The denial of the writ of certiorari by the Supreme Court in the prior litigation is found in Cincinnati, Indianapolis and Western Railroad Company v. Indianapolis Union Railway Company, et al., 258 U. S. 629.

Supreme Court of the United States

NO. 328.

OCTOBER TERM, 1925.

CINCINNATI, INDIANAPOLIS
& WESTERN RAILROAD COMPANY,
Appellant,

v.

INDIANAPOLIS UNION RAILWAY
COMPANY, THE CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAILWAY COMPANY,
AND THE PITTSBURGH, CINCINNATI, CHI-
CAGO & ST. LOUIS RAILWAY COMPANY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

The single question before this court for decision is whether or not the District Court had jurisdiction to entertain appellant's petition, filed July 2, 1924; but a proper understanding of that question requires some knowledge of the history of the relations between the parties and of the prior litigation between the appellant and the appellees. The appellant's statement of these matters in its brief, under the head-

ing "Statement of the Case," is believed by appellees to be not sufficiently full; and therefore we give our own statement thereof below.

Situation of the Parties and their Predecessors Prior to Appellant's Purchase at Foreclosure Sale in the District Court (1883-1915).

The Indianapolis Union Railway Company is an Indiana corporation. It owns and operates the union depot and the union tracks at Indianapolis; it holds under 999 year lease, and operates, the belt railroad at Indianapolis (R., 53-54 and 109). Until 1883, the union depot and the union tracks were owned by certain of the railroads entering the city (the predecessors of the appellee, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and of the appellee, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, which last-named two companies, and their predecessors, are known as the "proprietary companies"). On September 20, 1883, an agreement (R., 55-60 and 109-110) was made between the proprietary companies. It provided, in brief, that the proprietary companies should convey the union depot and union tracks to the Indianapolis Union Railway Company; that the latter company should acquire certain additional lands and should erect, on the real estate so conveyed to it and on such additional lands, a new union depot and additional union tracks; that the Indianapolis Union Railway Company should be paid by the companies using its facilities, including the proprietary companies, a "fixed rental" equal to seven per cent per annum upon the then appraised value of its depot, tracks and belt line and upon the cost of all additions and betterments thereafter made, said fixed rental to be "from time to time divided into as many equal shares as there are railroad companies using said property, and each company so using the same" to

"pay one of said shares" and no abatement to be made from any user's share of said fixed rental "by reason of such company not using either the union passenger depot or the Belt Railway"; that the expenses of operation should be paid by the several users of the properties "in proportion to such use, on the basis of wheelage"; that seven named non-proprietary companies were to be admitted to the "joint use" of the terminal facilities upon their respectively signing and sealing a copy of the agreement but were not to become thereby members or owners of the Indianapolis Union Railway Company; that the right of use of all signatories was to be perpetual; and that, in view of the fact that the large prospective outlay for new facilities was to be made mainly in the interests of the non-proprietors, said non-proprietors bound themselves "to forever continue in the joint use aforesaid."

The appellant's two original predecessor companies, the Indianapolis, Decatur & Springfield Railway Company (running west from Indianapolis) and the Cincinnati, Hamilton and Indianapolis Railroad Company (running east from Indianapolis) were among the seven non-proprietary companies who accepted and signed said agreement of September 20, 1883. (R. 60 and 110-111.) In 1902 the Indiana, Decatur and Western Railway Company (successor of the Indianapolis, Decatur and Springfield Railway Company) and the Cincinnati, Hamilton and Indianapolis Railroad Company were consolidated into the Cincinnati, Indianapolis and Western Railway Company (R. 63 and 111). Prior to the consolidation, the two lines respectively east and west of Indianapolis each paid one full share of fixed rental to the Indianapolis Union Railway Company; and after the consolidation in 1902, the consolidated company (and its receivers appointed in the foreclosure suits hereinafter referred to, in the District Court below) paid to the Indianapolis Union Railway Company two shares of said fixed rental, one by virtue of the original con-

tract of the Indianapolis, Decatur and Springfield Railway Company and the other by virtue of the original contract of the Cincinnati, Hamilton and Indianapolis Railroad Company (R. 63 and 111).

APPELLANT BECOMES PURCHASER AT FORECLOSURE SALE IN THE DISTRICT COURT (1915).

Foreclosures of the first and refunding mortgage of the consolidated company (the Cincinnati, Indianapolis and Western Railway Company) and of the prior lien mortgage of the Indiana, Decatur and Western Railway Company were had in two suits in the District Court below, and the railroad property of the Cincinnati, Indianapolis and Western Railway Company was sold to a purchasing committee which assigned its purchase to the newly organized Cincinnati, Indianapolis and Western Railroad Company, the appellant in the case at bar. The sale was confirmed by the court and the Master conveyed the property to the appellant on November 30, 1915 (R. 111). In each foreclosure case, among the items of property sold and conveyed to appellant, was "contract dated September 20, 1883, and amendment of August 30, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis" (R. 111). Each foreclosure decree provided that the purchaser, or his assignee, should have the right, for a period of 30 days after delivery of the Master's deed, "to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company (the Cincinnati, Indianapolis and Western Railway Company) or its predecessors in title;" and that such purchaser or his assignee should "be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this court within said period of thirty days" (R. 23 and 111-112).

On December 24, 1915, the appellant, assuming to act under the authority of the foregoing provision, attempted to reject its liability for one share of the fixed rental payable to the Indianapolis Union Railway Company by filing in each foreclosure case a so-called election "not to assume or adopt * * * the * * * contract dated September 20, 1883, and the amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied at Indianapolis, in so far as such rights are conferred by the signature of the Indianapolis, Decatur and Springfield Railway Company to said contract. This assignee hereby expressly accepts such contract as made with the Cincinnati, Hamilton and Indianapolis Railroad Company and desires to accept the benefits of the contract with said company and the right to occupy the tracks of the Union Railway Company and the Indianapolis Belt Railway Company, therein conferred" (R. 112). Thereupon appellant took the position that it could exercise all of the rights of its predecessor by paying to the Indianapolis Union Railway company only one share of said fixed rental, instead of the two shares which its predecessor and that predecessor's predecessors had always paid.

Entry of Appellees into the Foreclosure Suits for Purpose of Preventing Appellant's Attempted Avoidance of the Obligations of its Purchased Contract, and Termination of the Resulting Litigation in Favor of Appellees (October 24, 1916—May 1, 1922).

The Indianapolis Union Railway Company and its then three proprietary companies then filed in the foreclosure suits in the District Court below their petition (R. 53-65) asking that the Cincinnati, Indianapolis and Western Railroad Company (appellant in the case at bar) be required to show cause

why it should not be ordered to pay to the Indianapolis Union Railway Company the full amount that would have been payable by the Cincinnati, Indianapolis and Western Railway Company if said last named company "had continued in the use and enjoyment of the railroad property, rights and privileges described in and ordered to be sold" by the decrees of foreclosure and sale, and praying for other and further relief. Appellant (defendant in that petition) moved to dismiss the petition for lack of jurisdiction and want of equity (R. 66). Its motion was overruled (R. 73). Appellant then answered the petition on the merits (R. 73-83). The motion of the petitioners in the petition to strike out all the alleged defences in the answer was sustained (R. 86-88). Appellant then moved for leave to file an amended and supplemental answer (R. 88). The court overruled the motion, (R. 101) and entered an order denying appellant's asserted right to reject its liability for one share of said fixed rental while at the same time making the full use of the facilities of the Indianapolis Union Railway Company which its predecessor had made, and holding appellant liable to pay two shares of said fixed rental (R. 101-103). The cause was then referred to a Master, who stated the amount of appellant's liability to the Indianapolis Union Railway Company. The court confirmed the Master's report (R. 103-104). The Cincinnati, Indianapolis and Western Railroad Company appealed to the Circuit Court of Appeals, which court, in its opinion handed down February 7, 1922 (R. 109-118), affirmed the decree of the District Court. The opinion of the Circuit Court of Appeals is in 279 Fed. 356. The Cincinnati, Indianapolis and Western Railroad Company then petitioned this court for a writ of certiorari, which was denied on May 1, 1922 (258 U. S. 629).

From May 1, 1922, forward, the Cincinnati, Indianapolis and Western Railroad Company continued to use the terminal

facilities of the Indianapolis Union Railway Company and paid two shares of said fixed rental therefor (R. 35).

Attempt of Appellant, by Petition Filed in the Foreclosure Cases July 2, 1924, to Rescind Contract of 1883 with Indianapolis Union Railway Company, on Which Contract Appellant is Bound by Its Purchase at Foreclosure Sale in 1915.

On July 2, 1924, the Cincinnati, Indianapolis and Western Railroad Company filed in the District Court below the petition which is involved in the case at bar (R. 2-11). That petition recites briefly the history of the prior litigation and then alleges that until the decision of this court denying certiorari on May 1, 1922, the petitioner "did not know its rights and obligations arising from its said election and the decrees," and that, had it been aware of the results which would follow the so-called election, it would have rejected all of the obligations of its predecessors (R. 10). The prayer of the petition is that the appellees in this court "be required to show cause, if any, why your petitioner should not be permitted to rescind its acceptance of the said contract and that such rescission be ordered and that it be permitted to cancel all of the obligations arising under said contract or contracts of September 20, 1883. * * * and that the foreclosure decree in this case be modified to the extent necessary" and that petitioner have "such further relief as the equity of the case may require and as may seem meet."

To this petition the appellees addressed a joint and several motion to dismiss, on the ground of want of jurisdiction and, alternatively, on the grounds that the petition did not state a valid cause of action in equity, that the opportunity of petitioner to exercise its rights, if any, to change the elec-

tion or to modify the foreclosure decree was exhausted by the prior proceedings in the District Court and on appeal, that the alleged mistakes from the consequences of which petitioner asked relief were mistakes of law only and not of fact, and that petitioner had been guilty of laches depriving it of the right to relief prayed for or to any relief in equity (R. 13). After oral argument on the motion, the District Court handed down a written opinion (R. 33-42), the gist of the ruling of said court being stated in the conclusion of said opinion (R. 42) as follows:

> "For the reasons stated, we are constrained to the opinion that the petitioner is not entitled to relief in these actions upon the ground of the mistake alleged, nor, if the petitions were amended so as to aver the mistake immediately subsequent to May, 1922, the ignorance of the existence of a right to then prosecute such action, could the court entertain such bill as supplementary and ancillary to these cases, for want of jurisdiction."

Thereupon petitioner obtained leave of court to file, and did file, an amendment to its petition (R. 42-43). The amendment states (R. 43-44): That shortly after May 1, 1922, the petitioner "called to the attention of the Indianapolis Union Railway Company the amount of the over-payment based on use for the period January 1, 1916, to May 31, 1922, inclusive, with petitioner paying two-thirteenths rental" and requested that it (petitioner) be relieved of the same in the future; that "petitioner never intended to acquiesce and did not acquiesce in the decision requiring it to pay two-thirteenths of the rental contrary to its expressed intention not to do so by the written election filed herein, and petitioner attempted in various ways, for a reasonable time, to be relieved of such obligation without recourse to law;" that in September, 1923, petitioner's then president "who had made the aforesaid re-

monstrances and efforts to be relieved" from said contract, resigned and a new president was not appointed until December 1, 1923; and that "when petitioner ascertained that it could get no relief without resort to court action it expressly made all payments under protest and began preparation for relief through the courts."

To this petition as amended, the appellees addressed a joint and several motion to dismiss, upon the same grounds as taken in the motion to dismiss the original petition (R. 44-45). Thereupon the District Court handed down a second written opinion (R. 45-49), holding that the controversy between the parties is "founded upon a contract as definitely and distinctly entered into as if it had been made by document altogether independent of the foreclosure," that such controversy is not ancillary to the foreclosure suit, and therefore that the amended petition must be dismissed for want of jurisdiction. There was a decree accordingly (R. 49), from which this appeal is taken.

ARGUMENT.

The District Court did not Err in Dismissing the Amended Petition for Want of Jurisdiction.

The District Court dismissed the appellant's petition, as amended, for want of jurisdiction, thereby holding that the relief which appellant sought, viz.: relief from an accepted contract, was in no sense ancillary to the original foreclosure proceedings. There was error in the decree if, and only if, the relief sought by appellant was not relief from an accepted and binding contract. That such was the relief sought by appellant is conclusively demonstrated by an analysis of the facts in the record. Such contract became in all respects valid and binding on appellant either (a) on December 30, 1915, the day on or before which the purchaser at the foreclosure

sale was required by the foreclosure decree to file a written election not to adopt the contract, or (b) on May 31, 1922, being thirty days after this court terminated the prior litigation by refusing certiorari, or (c) within a reasonable time after May 1, 1922, the day that this court denied the writ of certiorari in the prior litigation. For the purposes of the case at bar, it is immaterial which of these three views is taken as to the time when such contract became binding on appellant. In our opinion the first view is logically the correct one. The District Court preferred the second or the third view. But the vital point is that such contract became valid and binding on appellant long prior to July 2, 1924, the date on which appellant filed its petition in the lower court in the case at bar; and this being true, it follows inevitably that the controversy raised by said petition was not within the jurisdiction of the trial court, since no federal question was presented by the petition and there was not the requisite diversity of citizenship between the parties and the relief sought was not in any way ancillary to the original proceedings in foreclosure.

An Executed Contract of Sale by a Receiver to a Purchaser at Receiver's Sale Stands on the Same Footing as an Executed Contract Between Private Persons.

In the course of the proceedings instituted by the appellees herein in the District Court on October 24, 1916 (R. 53), it was conclusively adjudicated in the District Court and in the Circuit Court of Appeals, that the appellant herein, by virtue of the decree in the foreclosure suit and appellant's conduct pursuant to the provisions of that decree, accepted the contract of its predecessor, the Cincinnati, Indianapolis and Western Railway Company, with the Indianapolis Union Railway Company and became (and therefore now is) bound to perform that contract and to pay in full the two shares of fixed rental

paid by its said predecessor. This obligation of the appellant is, under the authorities, as complete and binding an obligation as any obligation arising out of a contract executed between two private parties. It has been repeatedly held that a sale or contract made by an order of court creates, when confirmed by the court, precisely the same situation as is created by a sale or contract between private persons. One of the leading cases is *Files v. Brown*, 124 Fed. 133 (C. C. A., 8th Circuit). In that case, a receiver had sold to Files, for $25.00, a judgment for several thousand dollars. The receiver discovered, after the sale had been made and confirmed, that the judgment was probably worth a great deal more than $25.00, and he sued to have the contract of sale set aside. The lower court set the contract aside, but its action was reversed on appeal, the Circuit Court of Appeals saying:

> "The Court and its receiver had no higher right than any private vendor to undo their contract and to take from the vendee the property which he had purchased. * * * The question is, what facts are here averred which would entitle *a private citizen* to relief of this nature if he had accepted the offer of appellant." (Our italics.)

A few years later, in *Morrison v. Burnette*, 154 Fed. 617, the same court had before it a case in which a lease, made and confirmed by an order of the District Court, had later been set aside by the court because a higher bid for such lease had come in subsequent to the sale. The Circuit Court of Appeals again reversed the District Court and held that after the order of confirmation made by the District Court the rights of the parties were vested and nothing would warrant the court in setting aside the contract but fraud, deceit, or mistake, *for which equity would avoid a like contract between private parties.*

To the same effect see:

In re Burr Mfg. & Supply Co., 217 Fed. 16, (C. C. of Appeals, 2nd Circuit);
Earle v. McCartney, 112 Fed. 372, affirmed in 115 Fed. 462;
Cropper v. Brown, 76 N. J. Eq. 406, 74 Atl. 987.

A strong case on the same point is *Hayward v. Wemple*, 136 N. Y. Supp. 625, affirmed in 206 N. Y. 692, 99 N. E. 1108. There a purchaser of real estate at a judicial sale asked to be released from his agreement on the ground that he had mistakenly supposed that the mortgage on the real estate would not attach to it in his hands. The court said that the purchaser was simply attempting to rescind the contract made by the acceptance of his bid and that rescission could only be had under such circumstances as would justify it *between private parties.*

The same rule is laid down in *Koegel v. Koegel*, 83 N. J. Eq. 179, 89 Atl. 861.

As Mr. Justice Brewer said, speaking for the court in *Pewabic Mining Co. v. Mason*, 145 U. S. 356, "the purpose of the law is that the (judicial) sale shall be final," and it follows that when the sale has been made and confirmed, courts see no difference between the contract thereby created and a contract made entirely out of court, and apply the same rules to the one as to the other when questions of rescission, reformation or similar relief are involved and the jurisdiction of the court to grant such relief is in issue. A contract made under and pursuant to judicial proceedings is like any other contract; and a federal court, therefore, will take jurisdiction of questions arising under that contract if, and only if, it would take jurisdiction of similar questions arising under a contract executed in the ordinary way, i. e. if there is the requisite diversity of citizenship between the contending parties or if a federal question is involved. In the case at bar there is admittedly neither a federal question nor the requisite diversity of citizenship (R., 35-36).

Appellant's Petition is Simply a Suit Seeking Rescission of Appellant's Accepted Contract with the Indianapolis Union Railway Company. Of Such a Suit the District Court has no Jurisdiction.

Tested by these principles, did the lower court in the case at bar have jurisdiction of appellant's petition? We submit that it clearly did not. In June, 1915, that court (the United States District Court for the Southern District of Ohio, Western Division) by its decree of foreclosure ordered sold all of the properties of the Cincinnati, Indianapolis and Western Railway Company, including specifically the contract of September 20, 1883, between said company and The Indianapolis Union Railway Company. The appellant herein, The Cincinnati, Indianapolis and Western Railroad Company, purchased those properties, *including that contract.* (Actually appellant's assignor made the purchase, but appellant of course stands in the shoes of its assignor, and it will be simpler to discuss the case as though appellant had been the purchaser in the first instance.) The District Court then confirmed the sale to appellant. What was then the situation with respect to the appellant's relation to the contract here involved? It was this: Appellant had accepted that contract and was bound by it, subject only to its right, within 30 days after the date of the deed from the Master to appellant, to reject the contract. Appellant had only one course to pursue if it did not want the contract, viz: to reject it within 30 days from the date of the deed, i. e. on or before December 30, 1915. If appellant did not so reject the contract on or before December 30, 1915, its purchase of the contract—and therefore of course its acceptance thereof—became absolutely final. In other words, on December 31, 1915, if appellant had not before that date rejected the contract, appellant was as completely bound thereon, and so was the Indianapolis Union Railway Company, as though appellant and the Indianapolis Union

Railway Company had affixed their signatures thereto on that date. We repeat that it took *no affirmative action* on the part of appellant, after the delivery of the Master's deed, to accept the contract; the contract was already accepted, subject only to appellant's right to nullify the acceptance on or before December 30, 1915; and on and after December 31, 1915, the appellant's acceptance of the contract was complete, final, and indefeasible. Before December 31, 1915, however, appellant in effect said to the District Court: "I accept *all* the benefits of said contract of September 20, 1883, with The Indianapolis Union Railway Company, but I reject one-half the burdens thereof." Appellant was bound to know, as the District Court and the Circuit Court of Appeals have expressly held, that the District Court's foreclosure decree did not contemplate or permit any such action by appellant—that appellant had to reject the contract *in toto* before December 31, 1915, or on that day appellant would be automatically bound to perform the contract *in toto*. There is, as the Circuit Court of Appeals says in its opinion (R., 117), no suggestion in the record that appellant ever contemplated making the only rejection that was allowed by the decree, viz: rejection *in toto;* on the contrary, all of the inferences in the record are to the contrary (279 Fed. 356, 365). It follows, then, that since December 31, 1915, appellant and The Indianapolis Union Railway Company have both been completely bound by said contract of September 20, 1883. From the obligations of that contract appellant can be relieved on the same grounds, and no others, that equity will decree a rescission of any contract between private parties. The case before the court stands, therefore, as a simple suit by appellant to rescind in equity a contract upon which appellant has been completely bound since December 31, 1915.

Appellant's Petition Seeks Rescission of an Accepted Contract, not Modification of the District Court's Decree of Foreclosure.

We submit that from whatever angle the matter be viewed and however the question be phrased, there is on analysis no escape from the foregoing conclusion. It will not do to say that appellant's petition asks the District Court to modify its foreclosure decree—a power which that court admittedly has and could exercise in any proper ancillary proceeding. It is true that appellant's petition, after praying that appellant be permitted to rescind said contract, and cancel all of its obligations thereunder, also prays that the foreclosure decree "be modified to the extent necessary;" but what modification of the decree is in fact sought by appellant's petition? Indeed, what modification of the decree could the District Court have made on said petition? The plain fact is that no modification is sought. It is *relief from an accepted contract, not modification of a decree,* that appellant desires. The foreclosure decree of the District Court could be modified a dozen times and appellant would gain nothing thereby. By the same token, the appellant if entitled to any relief on the merits of its case (which we deny) could get in a proper court all the relief it seeks without any modification whatever of the foreclosure decree. If the question be thus tested by considering how a decree modify the foreclosure decree could be drawn to give appellant the relief which it wants, it becomes evident that appellant's desires could not be satisfied by any such modifying decree; they could be satisfied only by a decree rescinding the contract between appellant and the Indianapolis Union Railway Company. Such a decree could only be rendered in an original suit—a suit *de novo*—of which suit the District Court would have jurisdiction only if there were the requisite diversity of citizenship.

APPELLANT'S PETITION SEEKS RESCISSION OF AN ACCEPTED CONTRACT, NOT RESCISSION OF APPELLANT'S ELECTION.

Nor does it advance appellant's case to say that what appellant's petition sought was a rescission of its election. Appellant bought the contract of September 20, 1883, along with the other properties of its predecessor, in November, 1915, and received from the Master an instrument transferring that contract to it. It filed a purported election, in which it sought to retain all the benefits of that contract and reject one-half of its burdens, on December 24, 1915. If appellant were now permitted to "rescind" that election, what would be the result? The appellant would gain nothing thereby. The purported election would be out of the way, but appellant's contract with The Indianapolis Union Railway Company would not be, because that contract was on December 31, 1915, automatically and without any election, absolutely binding on appellant. The situation before the court is not as though appellant had been required by the foreclosure decree expressly to accept the contract with The Indianapolis Union Railway Company and had filed its election so to do, which election it now seeks to rescind. No election to accept was necessary; final acceptance was automatic on December 31, 1915. Thus analyzed, it is seen that what appellant's petition seeks is not the rescission of its purported election, but the *rescission of its contract* with the Indianapolis Union Railway Company. Indeed, the appellant's petition states that rescission of its contract with the Indianapolis Union Railway Company is the relief sought. The prayer of the petition is that appellant "be permitted to *rescind its acceptance* of the said contract and that such rescission be ordered and that it (appellant) be permitted to *cancel all of the obligations* arising under said contract." Appellant can get this relief, if at all, only in a new suit before a court having original jurisdiction of all the parties to the controversy.

THE ACCEPTED CONTRACT WHICH APPELLANT SEEKS TO RESCIND HAS BEEN BINDING ON APPELLANT SINCE DECEMBER 31, 1915, OR—AT THE VERY LATEST—SINCE MAY 31, 1922.

We submit, therefore, upon the foregoing argument, that appellant has been bound on the contract of September 20, 1883, with The Indianapolis Union Railway Company since December 31, 1915. But if the view be taken that appellant was not bound on said contract until thirty days, or a reasonable time, after appellant knew from the courts exactly what its rights and obligations were, the result in the instant case is the same. The final decree of the District Court in the prior litigation was rendered on December 17, 1920 (R., 103-104) and on July 6, 1920, that court entered a decree which completely advised appellant of the court's holding on the extent of its rights (R., 101-103). While the appellant of course had the right to appeal, as it did, in the prior litigation, still the orders and decrees of the District Court were at least *prima facie* correct, and therefore, in the situation in which appellant then found itself, appellant should be held to have known what its rights were on July 6, 1920, or at most, on December 17, 1920. And appellant took no action whatsoever by way of rejecting the contract with the Indianapolis Union Railway Company within thirty days, or a reasonable time, after either July 6, 1920, or December 17, 1920. Nor did appellant take any action whatever by way of rejecting said contract within thirty days, or a reasonable time, after February 7, 1922, the date on which the Circuit Court of Appeals affirmed the decree of the District Court in the prior litigation (R., 109-118). Nor—coming to the very latest date that can possibly be taken—did appellant take any action whatever by way of rejecting said contract within thirty days, or a reasonable time, after May 1, 1922, the date on which this court denied appellant's petition for a writ of certiorari (258 U. S. 629). Certainly

appellant knew precisely what its obligations were on May 1, 1922. It did not file the present petition until July 2, 1924. And during all of the interval between May 1, 1922, and July 2, 1924, it "continued to use the terminal facilities of The Indianapolis Union Railway Company and to pay the fixed rental established under the prior decisions upon the point" (R., 35), that is to say, two shares, or two-thirteenths, of said fixed rental, pursuant to the contract obligations of its predecessor under said contract of September 20, 1883. That such conduct and appellant's failure to take any steps toward rejecting said contract, not only on or before May 31, 1922, but during the entire period from May 1, 1922, to July 2, 1924, bound appellant to said contract (even if it was not so bound on December 31, 1915, which we think it was) seems too clear for argument. As the District Court said (R., 47-48);

> "A renewed contract relation came into existence through the purchase at foreclosure in 1915 and the inaction of the petitioner (appellant) in 1922. The only right given by the decree was to reject within the short period allowed. The petitioner was advised in 1922 that it must reject both contracts or neither. It saw fit not to reject both. It therefore became bound by both * * * Promptness in declaring rejection of the contracts was a condition precedent to the very existence of the right of rejection. The right is not now unenforceable by reason of any waiver or acquiesence in the sense of estoppel, but the right to reject has ceased to exist by reason of breach of the condition precedent that it be promptly asserted. The right given was not of election in the sense of the necessity of definite action either to accept or reject, but was really an option to reject, which option has expired."

Such option to reject expired, at the very latest, on May 31, 1922, or within a reasonable time after May 1, 1922, and thereupon said contract was absolutely binding on appellant.

The appellant's petition seeks relief from and recission of that contract. If appellant is entitled to that relief at all, on the merits (which we firmly believe it is not) it can get such relief only in a court having jurisdiction of the parties. The question of whether or not such relief should be granted involves, as the District Court pointed out, "no question of construction, interpretation, modification or enforcement of the foreclosure decree. It is a controversy existing between the parties founded upon a contract as definitely and distinctly entered into as if it had been made by document altogether independent of the foreclosure. It is not to be considered as ancillary to the foreclosure suit." The decree of dismissal for want of jurisdiction was therefore clearly correct.

COMMENTS ON APPELLANT'S BRIEF.

We wish first to mention briefly some of the several statements in appellant's brief which we believe are inacurate.

It is stated in several places in appellant's brief that appellant's petition filed in the District Court on July 2, 1924, sought "to rescind its election." This phraseology is unjustified. As we have shown above, an analysis of the petition shows that what appellant sought was relief from and rescission of its accepted contract with the Indianapolis Union Railway Company; and the prayer of the petition itself so states.

It is stated on page 25 of appellant's brief that the amendment to appellant's petition "alleges that appellant gave notice to appellees of its intention to rescind." We find no such allegation in the amendment. Nor do we find in the amendment or elsewhere in the record any support for the statement on page 28 of appellant's brief that "appellees were put on notice that such suit (to rescind) would be brought if other efforts failed."

We distinctly disagree with the statements on pages 11, 12, 17 and 21 of appellant's brief that the District Court in its first opinion held that it had jurisdiction to entertain the petition and that it decided all matters raised by the motion to dismiss, "including the question of jurisdiction, in favor of appellant, but held that the petition should be dismissed on the ground of waiver and acquiesence." A reading of the District Court's first opinion will show that the court really took the same grounds for his conclusion in that opinion as he took in the second opinion, the opinion upon the motion to dismiss the petition as amended. The reasoning of the court (R. 41-42) is that appellant's conduct in using the terminal facilities of the Indianapolis Union Railway Company and paying the full two shares of rental therefor from May 1, 1922, forward, and in failing to take any action with respect to rejecting the contract, completely bound appellant to that contract; that in this situation "the granting of the relief prayed for in no way involves a construction of the original foreclosure decree nor the construction to be given to any act thereunder;" and therefore that the court had no jurisdiction. This same reasoning is stated completely and clearly in the second opinion. There is, therefore, no justification for the statement on page 18 of appellant's brief that the District Court "changed its opinion on the question of jurisdiction," nor for the statement on page 26 of appellant's brief inferring that the District Court indicated in the second opinion that he had "lost jurisdiction." Other similar erroneous statements in appellant's brief might be specified, but we refrain from extending this brief by so doing.

Appellant has appealed from the decree of the District Court dismissing the petition, as amended, for want of jurisdiction, and the question before this court is whether that decree was right or wrong, and not whether the lower court in some particulars employed words or ideas which might have

been improved upon. For this reason we do not deem it necessary to enter into a long discussion of each sentence of the trial court's two opinions; and for the same reason we refrain from any comment on the merits of the case and on that part of the trial court's first opinion which deals with the merits.

So far as the cases cited by appellant are concerned, it only needs to be said that they are obviously inapplicable to the issue in the case at bar. Of course appellees have no quarrel with the rule laid down by the Circuit Court of Appeals in the prior litigation (279 Fed. 356, 362) and enunciated in the other cases cited by appellant, to the effect that "a bill in equity dependent upon a former suit * * * may be maintained * * * to restrain, avoid, explain or enforce the judgment or decree therein;" but these cases are no authority for sustaining the jurisdiction of the District Court in the instant case, in which appellant seeks, not construction, explanation or enforcement of the District Court's foreclosure decree, but rescission of appellant's accepted contract with the Indianapolis Union Railway Company.

Appellant's argument is addressed to what appellant conceives to have been the reasoning of the trial court, and not to the decree which the trial court made. Further, appellant misunderstands the District Court's reasoning. Appellent assumes that the District Court "barred relief on the ground of waiver or acquiesence" and then proceeds to a discussion of the doctrine of waiver and acquiesence. Of course the District Court did not simply say, as appellant would have it appear: "There was waiver and acquiesence by appellant; therefore I have no jurisdiction." What he said was that the appellant's conduct from May 1, 1922, on, in using the terminal facilities of the Indianapolis Union Railway Company, in paying two shares of fixed rental for such use, and in failing to take any steps to reject the contract, amounted to and was an

acceptance of the contract and therefore that the relief sought by appellant, viz.: the rescission of such accepted contract, was in no way ancillary to the original foreclosure suit.

The appellant's contention that the amendment to the petition helps appellant's case is decisively answered in the trial court's opinion (R. 46). As the court there points out, neither the amendment nor the original petition avers that the appellant at any time asserted "any right, now asserted, to be relieved of all contractual obligations with the Indianapolis Union Railway Company or to surrender the benefit of such contract or to cease the use of the terminal facilities afforded thereunder. From all that appears, the purpose of the petitioner was to retain the use of the terminal facilities but to secure a reduction of the rental to be paid from two-thirteenths of the fixed rental to one-twelfth thereof." Manifestly, such a purpose, far from showing that appellant had not accepted the contract, proves just the reverse, that appellant was bound by the contract.

Upon the foregoing considerations we submit that the District Court's decree dismissing the appellant's petition as amended, for want of jurisdiction, was clearly correct and should be affirmed.

Respectfully submitted,

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JOSEPH J. DANIELS,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

Nos. 328, 329.—October Term, 1925.

Cincinnati, Indianapolis & Western Railroad Company, Appellant, *vs.* Indianapolis Union Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.	Appeals from United States District Court for the Southern District of Ohio.

[March 1, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

These are appeals under section 238 of the Judicial Code, allowed February 18, 1925, in two cases between the same parties from identical decrees of the District Court for the Southern District of Ohio. By agreement they are to be treated in every respect as one. The certificate of the District Court is that the petition as amended "does not show the existence of the requisite diversity of citizenship, nor the existence of a Federal question, and that this Court, not having found the said petition to be ancillary to any prior suit, but having found the said petition to be original, did thereupon dismiss the same upon the sole ground of want of jurisdiction." The question of jurisdiction is whether a petition by the purchasing company at a railway foreclosure sale in seeking to reform, because of mistake, its contract of purchase in imposing upon it liability for rentals under a terminal facilities contract, is a suit ancillary to the original foreclosure suit so that jurisdiction exists in the Federal district court to hear it, without regard to the citizenship of the necessary parties to the petition.

The two original foreclosure suits were brought, one by the Equitable Trust Company of New York and Elias J. Jacoby as trustees, against the Cincinnati, Indianapolis & Western Railway Company, and the other by the Central Trust Company of New

York and Mason, trustees against the same Railway Company. There was the necessary diversity of citizenship in each case, and the appellant in this present suit, the Cincinnati, Indianapolis & Western Railway Company, is a newly organized company, the assignee of the purchaser at the foreclosure sales of the whole railroad property covered by all the mortgages foreclosed. It became a party to each cause as such assignee, as permitted in the decree of foreclosure in each case, and it will be hereafter called the purchasing company.

The Indiana, Decatur & Western Railway Company owned the part of the railway from Indianapolis to Springfield, Illinois. The Cincinnati, Hamilton & Indianapolis Railway Company owned the part from Indianapolis to the East. In 1902 they were merged into a corporation called the Cincinnati, Indianapolis & Western Railway Company, which gave a first refunding mortgage upon the two properties. It was expected that the bonds secured by this mortgage would be used in refunding two underlying mortgages on the eastern part, and a single underlying mortgage on the western part. The refunding was not completed and the two foreclosure suits, already referred to, were filed at the same time in the same court, so that by an identical decree in each case the purchaser was enabled to acquire title to the consolidated railway free from the liens of the four mortgages. The decree of foreclosure in each case contained a provision giving the purchaser under the foreclosure sale, and his successors or assigns, the right for a period of thirty days after the delivery of the master's deed, to elect "whether or not to assume or adopt any lease or contract made by the defendant consolidated company, or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this Court within the said period of thirty days."

Within the thirty days, the purchasing company filed in the two foreclosure cases what it called an election "not to assume or adopt the contract dated September 20, 1883, and the amendment of August 20, 1906, under which the tracks of the Union Railway Company are occupied in Indianapolis in so far as such rights are conferred by the signature of the Indianapolis, Decatur

Springfield Railway Company to said contract. This assignee eby expressly accepts such contract as made with the Cincin- i, Hamilton & Indianapolis Railroad Company, and desires to ept the benefits of the contract with said company, and the ht to occupy the tracks of the Union Railway Company and Indianapolis Belt Railway Company therein conferred."

The Indianapolis Union Railway Company is a company engaged operating a union railway depot and union railway tracks for use of several railroads entering that city, its properties having n owned by five so-called proprietary companies and conveyed them to it. It had acquired a perpetual lease of a belt line. ptember 20, 1883, an agreement was made between the Union ilway Company and five proprietary companies, by which each the companies in the use of the terminals became liable for a ed rental which was to be paid by each company, whether e terminal was used or not. Then there were admitted seven n-proprietary companies to the joint use of the Belt Rail- y and Union Railway Company property under the same reement as to a fixed rental, in addition to which there as to be a payment in proportion to the use on the basis of ieelage. At this time the Indianapolis, Decatur & Springfield ilway Company owned the part of the railroad here in question est of Indianapolis, and it bound itself for one-thirteenth of the ntal, and the Cincinnati, Hamilton & Indianapolis Railroad Com- any owning the other part of the railroad here in question east Indianapolis became bound for another one-thirteenth of the ntal. In 1902, the two companies were united under the name of ie Cincinnati, Indianapolis & Western Railroad Company, and om that time until the foreclosure in 1915, the united company aid two-thirteenths of the rentals. When, however, the decrees ere made in the foreclosure of the two parts of the railway the urchasing company, the appellant here, sought to reduce its rental om two-thirteenths to one-thirteenth by electing to take the con- act for rental of its predecessor in title of the eastern part of ie united railway, and to refuse to elect to take the contract of ental of its predecessor in title for the western part of the railway, nd having filed such an election, it declined to pay more than one- hirteenth of the rental.

There then intervened in the original foreclosure suits the ndianapolis Union Railway Company and the then proprietary

parties to the terminal agreement by petitions asking that the purchasing company show cause why it should not be ordered to make payment to the Indianapolis Union Company of the full amount that would have been payable to that company by the Cincinnati, Indianapolis & Western Railway Company, the defendant in the foreclosure in both suits. Jurisdiction was taken of this petition, and the District Court held that the so-called election was unauthorized and improper, and that the purchasing company for failure to elect to reject the contracts entirely was responsible for two-thirteenths of the total rentals. This controversy was carried to the Circuit Court of Appeals for the Sixth Circuit, which affirmed the District Court. *Cincinnati, I. & W. R. Co.* v. *Indianapolis Union Railroad Company*, 279 Fed. 356.

The order of the Circuit Court of Appeals was made in 1922. In 1924, the present intervening petition was filed by appellant as purchaser against the Indianapolis Union Railway Company and the proprietary companies, which had been parties to the preceding controversy. In this, the petitioner, the present appellant, sought to have the court relieve it from the effect of its so-called ineffective election by which it made itself responsible according to the decree of the Circuit Court of Appeals for two-thirteenths, on the ground of its mistake in not electing to reject the whole contract for use of the terminals. On the hearing of the petition to which the Indianapolis Union Railway Company and the other defendants filed answers, the District Court held that the delay of two years between the coming down of the decree from the Circuit Court of Appeals in 1922 until 1924, when the petition was filed, was a delay constituting acquiescence which would prevent the consideration of the petition. The petitioner then filed an amendment to its petition, in which it set out reasons thought by it to justify the delay, including a statement that attempts had been made to secure relief by a personal negotiation with the interested parties to whom it had indicated from the first that it did not intend to acquiesce in an obligation to pay the rentals. The District Court, conceiving that by reason of the delay of two years such relief as the petitioners sought must be obtained by an independent suit, and not by an ancillary proceeding, held that there being no diversity of citizenship or Federal question to justify jurisdiction, the petition must be dismissed.

The sufficiency of the petition in equity is not for us to consider. We have here only the question of jurisdiction. On that issue, we think the District Court was in error. The present proceeding deals with the effect of the decree upon which the petitioner became the owner of the property. The previous litigation between the parties to this petition as to the effect of the attempted election in which the petitioner was defeated involved a construction of the decree of sale and the purchaser's action under it in the foreclosure proceedings. That decree provided that "all questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this Court for further relief at the foot of this decree". It also provided "that the purchaser had the right to enter appearance in this Court and to become a party to this cause", and it made itself a party under that order. The Circuit Court of Appeals in its opinion in the case already cited said:

"Notwithstanding the property had passed from the possession of the court, appellant, (that is petitioner), as the purchaser would have an undoubted right to apply to the court for relief respecting the controversy over its right of election under the sale."

At the instance of the defendants here, the purchaser was held by its so-called election to be bound to the two contracts, and having been thus defeated, it seeks the equitable intervention of the court, on the ground of mistake, to secure relief from this adjudicated effect of its unsuccessful attempt at election. Assuming that it has a right to seek such a remedy (and we must do so in this hearing), we do not see why it may not obtain that relief in the same forum by ancillary proceeding in the original suit in foreclosure in which it was held to have bound itself by its purchase and ineffective election. It may be that equity will not give it relief from mistake under the circumstances. It may be that it has acquiesced and may be denied relief on that account. It may be that it has been guilty of laches. But these are questions on the merits. We can not see that they affect the jurisdiction of the court to consider the issue thus raised.

The present proceeding is only another phase of the same litigation, carried on as ancillary to the foreclosure suit, in which the purchasing company was found to be bound by its purchase to pay two-thirteenths of the rentals to the Indianapolis Union Rail-

way. The purchaser seeks to recur to the circumstances under which it attempted to accept liability to pay one-thirteenth of the rental and to reject the other one-thirteenth. It says that as the Circuit Court of Appeals has held that its attempted election was invalid and ineffective for the purpose, it should have equitable relief from the oppressive obligation to pay two-thirteenths on the ground of its mistake and be permitted to make an election which will relieve it from the contract to pay any rental at all, as it might have done when it became the purchaser. Such a proceeding is certainly ancillary to the enforcement of the decree of sale and the contract of purchase. *Rosenbaum* v. *Council Bluffs Insurance Company,* 37 Fed. 724; *Bradshaw* v. *Miners' Bank of Joplin,* 81 Fed. 902. Clearly it is a natural and closely proximate sequence of the sale by the Court and requires the interpretation of its decree and the attempted election of the purchaser under it and the consideration of its effort to correct the alleged inequitable result. "A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to." *Blossom* v. *Railroad Company,* 1 Wall. 655, 656. It is well settled that where a bill in equity is necessary to have a construction of an order or decree of a Federal court, or to explain, enforce or correct it, a bill of this kind may be entertained by the court entering the decree, even though the parties interested for want of diverse citizenship could not be entitled by original bill in the Federal court to have the matter there litigated. *Julian* v. *Central Trust Company,* 193 U. S. 93, 113; *Minnesota Company* v. *St. Paul Company,* 2 Wall. 609, 633; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38, 54; *Hoffman* v. *McClelland,* 264 U. S. 552, 558.

The District Court had jurisdiction, and the decree dismissing the petition should be

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.